85-1109

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NO. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

HUMBLE EXPLORATION COMPANY, INC., et al.,
Petitioners,

v.

JANE H. BROWNING, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

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December 24, 1985

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QUESTIONS PRESENTED

1. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied when a Texas Court of Appeals dismissed their pending appeal from a judgment rendered against them in the Court of first instance by a biased and corrupted judge following an unfair trial, on the ground that Petitioners forfeited their appeal by unsuccessfully collaterally attacking the validity of that judgment when Respondents sued to enforce it in federal court?

2. Were Petitioners' rights under the Due Process Clause of the Fourteenth Amendment to the federal Constitution denied by the Texas Court of Appeals' dismissal of Petitioners' appeal on a novel application of the doctrine of election of remedies announced for the first time in their case, which punished Petitioners for exercising their federal constitutional right to defend themselves in the federal court when sued there by Respondents?

3. Whether the Texas Court of Appeals could, without violating the Due Process Clause of the Fourteenth Amendment to the federal Constitution, force Petitioners, who were unable to supersede an $82 million state court judgment rendered against them and were sued in federal court by Respondents to enforce it, to choose between foregoing a defense related to the validity of that judgment or else forfeit their pending appeal.

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LIST OF ALL PARTIES

1. Pat S. Holloway
2. Humble Exploration Company, Inc.
3. Sterling Pipeline Company
4. Flojo Trading Corporation
5. Holloway Exploration Corporation
6. Robbie Holloway
7. Jane H. Browning, Individually, and as Co-Independent Executrix of the Estate of William W. Browning, Jr.
8. Michael G. Starnes, Individually, and as Co-Independent Executor of the Estate of William W. Browning, Jr.
9. Kathryn Agnes Land Starnes
10. Kathryn Louise Browning Cook
11. Averille Adams Browning Dawson
12. William Webb Browning, III
13. Winifred Fallon Browning
14. Robert Holland Browning

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PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

OPINIONS BELOW

The opinions of the Texas Court of Appeals for the Fifth Supreme Judicial District of Texas at Dallas (hereafter "the Dallas Court of Appeals") are reported at 677 S.W.2d 111 and 690 S.W.2d 321. The orders of the Supreme Court of Texas refusing Petitioners' Application for Writ of Error to the Dallas Court of Appeals and denying Petitioners' Motion for Rehearing of their Application are not officially reported, but are included in the Appendix.

JURISDICTION

The Dallas Court of Appeals' judgment was rendered on July 11, 1984, vacated on October 4, 1984, and reinstated by the Dallas Court of Appeals, sitting *en banc*, on March 26, 1985. On July 3, 1985, the Supreme Court of Texas refused Petitioners' Application for Writ of Error to the Dallas Court of Appeals, and on October 30, 1985, denied Petitioners' Motion for Rehearing of their Application. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISION INVOLVED IN CASE

Section 1 of the Fourteenth Amendment to the United States Constitution:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 12, 1979, Respondents filed suit against Petitioners in the 193rd District Court of Dallas County, Texas, seeking a constructive trust over all of Petitioners' assets, an award of damages, and the appointment of a receiver. On November 19, 1979, pursuant to 28 U.S.C. § 1478(a), Petitioners removed Respondents' lawsuit to the Bankruptcy Court for the Northern District of Texas.

There, on January 17, 1980, Petitioners and Respondents agreed, in a Stipulation and Agreement, that Respondents' lawsuit would be remanded to state district court for trial before a retired or visiting state district or appellate judge, and that "full rights of appeal" would be preserved to all parties. The Bankruptcy Court entered a Remand Order approving and incorporating the Stipulation and Agreement.

In compliance with the Remand Order, Respondents' lawsuit was remanded to the 193rd District Court where two retired state district judges were successively assigned to hear the case. A trial on the merits before retired Judge Fred Harless was scheduled for September 1982. Following a series of procedural maneuvers by Respondents, however, their lawsuit went to trial on July 6, 1982, before the active judge of the 162nd District Court, Judge Dee Brown Walker. Petitioners sought to have Judge Walker recused because of his extreme bias toward them and because he was not a retired or visiting state judge within the terms of the Stipulation and Agreement. Their recusal motion, however, was overruled, and after a trial rife with reversible error, Judge Walker on August 26, 1982, rendered a judgment, partly on jury findings and partly *non obstante veredicto*, imposing a constructive trust on Petitioners' assets, and awarding $82,000,000 in damages against Petitioners Pat S. Holloway and Humble Exploration Company, Inc.[1] Judge Walker set the supersedeas bond at $130,000,000, which prevented Petitioners from suspending execution of the judgment pending an appeal.

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1. Judge Walker disregarded jury findings that Petitioner Pat S. Holloway owned 100% of the stock of Petitioners Humble Exploration Company, Inc., and Sterling Pipeline Company and that Respondents' damages claims were barred by limitations.

On November 24, 1982, Petitioners, however, duly perfected their appeal to the Dallas Court of Appeals asserting 211 points of error, including the following:

POINT OF ERROR NO. 14

THE TRIAL COURT ERRED IN DECLARING VOID THE ORDER OF THE PRESIDING JUDGE OF THE FIRST ADMINISTRATIVE JUDICIAL DISTRICT, TRANSFERRING THE CASE BACK TO THE 193RD WITH JUDGE HARLESS PRESIDING BECAUSE THE 162ND LACKED JURISDICTION. (Tr. 970, 972.)

POINT OF ERROR NO. 15

THE JUDGMENT SIGNED AUGUST 26, 1982, AND ALL PRIOR PROCEEDINGS THEREUNDER ARE VOID AND SHOULD BE SET ASIDE BECAUSE THE 162ND JUDICIAL DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION. (Tr. 1421.)

POINT OF ERROR NO. 16

THE TRIAL COURT LACKED JURISDICTION TO ALLOW THE BROWNINGS TO SEEK ANY RELIEF IN THE 162ND JUDICIAL DISTRICT COURT BECAUSE TO DO SO VIOLATED THE EXPRESS TERMS OF THE STIPULATION AND AGREEMENT ON MANNER IN WHICH CONTROVERSY SHALL BE HEARD, DETERMINED, AND LIQUIDATED. (Tr. 864 at 878.)

POINT OF ERROR NO. 23

THE FAILURE BY JUDGE WALKER TO RECUSE HIMSELF OPERATED TO DEPRIVE AP-

PELLANTS OF PROCEDURAL DUE PROCESS, AS GUARANTEED BY THE CONSTITUTIONS OF THE STATE OF TEXAS AND OF THE UNITED STATES.

POINT OF ERROR NO. 24

THE FAILURE BY THE TRIAL COURT TO GRANT THE MOTION TO RECUSE OPERATED TO DEPRIVE APPELLANTS OF PROCEDURAL DUE PROCESS, AS GUARANTEED BY THE CONSTITUTIONS OF THE STATE OF TEXAS AND OF THE UNITED STATES.

(Brief for Appellants, Vol. 2, pp. 6, 7, 8.) Many of the other points of error concerned procedural rulings by Judge Walker which effectively deprived Petitioners of their right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment to the federal Constitution.

While Petitioners' appeal was pending before the Dallas Court of Appeals, Respondents, on March 23, 1983, filed a new lawsuit against Petitioners in the federal District Court for the Northern District of Texas, seeking to enforce the trial court judgment, which, because of the $130,000,000 bond requirement set by Judge Walker, Petitioners could not supersede. In this enforcement action, Petitioners moved for a summary judgment on the ground that Judge Walker had no jurisdiction to try Respondents' lawsuit because he was not a retired or visiting judge within the terms of the Stipulation and Agreement. The federal District Court granted Petitioners' motions for summary judgment on December 5, 1983. *Browning v. Navarro,* 37 B.R. 201 (N.D. Tex. 1983)

(*See* Appendix A). Respondents appealed that judgment to the United States Court of Appeals for the Fifth Circuit.

Respondents then moved the Dallas Court of Appeals to dismiss Petitioners' appeal on the ground that Petitioners had elected to appeal the trial court judgment to the federal District Court and had received satisfaction there. Petitioners moved the Dallas Court of Appeals to stay its consideration of their appeal pending the outcome of Respondents' appeal to the Fifth Circuit. On July 11, 1984, however, a Panel of the Dallas Court of Appeals granted Respondents' motion, holding that Petitioners had appealed to federal District Court by collaterally attacking the trial court judgment on a ground which the Panel stated Petitioners had failed to raise in the trial court.[2] (*See* Appendix B.) On July 26, 1984, Petitioners filed their Motion for Rehearing wherein they pointed out to the Dallas Court of Appeals that its judgment of dismissal was contrary to all previous Texas case law, and

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2. The Dallas Court's statements that Petitioners never called to Judge Walker's attention the retired/visiting judge requirement is a mischaracterization of the record. As demonstrated in Petitioners' Motion for Rehearing in the Dallas Court of Appeals, at least 11 pleadings or documents, 9 filed by Petitioners in the trial court, either referenced or included as an attachment the Remand Order and Stipulation and Agreement, and there are at least 14 references in the Statement of Facts wherein the Remand Order and Stipulation and Agreement were discussed in open Court. Judge Walker was indisputably aware that Respondents' suit was to be heard by a retired or visiting judge. *See* Motion of Appellants For Rehearing, Appendix. Moreover, assuming arguendo that Judge Walker was never notified of the Stipulation and Agreement, under *Kalb v. Feuerstein*, 308 U.S. 433, 444 (1940) such notice is immaterial. In *Kalb*, there was a total failure on the part of the debtors to contest the lack of jurisdiction in the state courts because of the pendency of their bankruptcy petition. Instead, the jurisdictional issue was raised for the first time in an independent state court proceeding instituted by the debtors to have the prior judgment rendered void.

that Petitioners would be precluded from obtaining any appellate review of the merits of the trial court judgment should the Fifth Circuit sustain Respondents' appeal from the federal District Court's summary judgment. Among the points of error asserted in the Motion for Rehearing filed by Petitioners were the following:

SECOND POINT OF ERROR

THE COURT OF APPEALS ERRED IN DISMISSING APPELLANTS' APPEAL INSTEAD OF SUSPENDING OR CONDITIONALLY DISMISSING IT DURING THE PENDENCY OF THE FEDERAL APPELLATE REVIEW OF THE FEDERAL DISTRICT COURT'S JUDGMENT VOIDING THE TRIAL COURT JUDGMENT.

SUBPOINT (A) OF SECOND POINT OF ERROR

THE COURT OF APPEALS ERRED IN HOLDING THAT APPELLANTS ELECTED AN INCONSISTENT REMEDY IN FEDERAL COURTS AND ARE THEREFORE "BARRED" FROM RELIEF IN THE STATE COURTS AND CONFINED TO FEDERAL COURTS FOR ANY RELIEF.

SUBPOINT (B) OF SECOND POINT OF ERROR

THE COURT OF APPEALS ERRED IN HOLDING THAT APPELLANTS "APPEALED" THE TRIAL COURT JUDGMENT TO THE FEDERAL DISTRICT COURT.

SUBPOINT (C) OF SECOND POINT OF ERROR

THE COURT OF APPEALS ERRED IN HOLDING THAT APPELLANTS ARE "BARRED"

FROM RELIEF IN THE STATE APPELLATE COURTS BECAUSE OF THE PROCEEDINGS IN FEDERAL COURT.

In support of these points of error, Petitioners argued that their fundamental constitutional right to appellate review had been destroyed "in clear violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. . . ." (Motion of Appellants for Rehearing at pages 23-24.) On September 7, 1984, the Dallas Court of Appeals overruled Petitioners' Motion for Rehearing without comment.

Then, on October 1, 1984, the Fifth Circuit, in *Browning v. Navarro,* 743 F.2d 1069 (5th Cir. 1984), reversed the federal District Court's summary judgment, holding that the retired and visiting judge requirement of the Remand Order and the Stipulation and Agreement had been fully satisfied once the lawsuit had been initially assigned to a retired judge. (*See* Appendix C.) On October 4, 1984, the Dallas Court of Appeals, on motion of Petitioners, vacated its judgment of dismissal and reinstated Petitioners' appeal. (*See* Appendix D.) On March 26, 1985, however, the Dallas Court of Appeals, sitting *en banc,* and without any oral argument, granted Respondents' Motion for Reconsideration, reinstated the Panel's July 11, 1984, judgment of dismissal, and dismissed once again Petitioners' appeal without addressing any of Petitioners' federal constitutional objections to the dismissal. (*See* Appendix E.)

Petitioners then filed an Application for Writ of Error in the Supreme Court of Texas asserting, among other points of error, the following:

POINT OF ERROR NO. 2

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS ELECTED AN INCONSISTENT REMEDY IN FEDERAL COURTS AND ARE THEREFORE "BARRED" FROM RELIEF IN THE STATE COURTS AND CONFINED TO FEDERAL COURTS FOR ANY RELIEF.

POINT OF ERROR NO. 3

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS "APPEALED" THE TRIAL COURT JUDGMENT TO THE FEDERAL DISTRICT COURT.

POINT OF ERROR NO. 4

THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONERS ARE "BARRED" FROM RELIEF IN THE STATE APPELLATE COURTS BECAUSE OF THE PROCEEDINGS IN FEDERAL COURT.

Under these points, Petitioners argued that dismissal of their appeal was in violation of the Due Process Clause of the Fourteenth Amendment to the federal Constitution. (Application for Writ of Error of March 28, 1985, at 29; Application for Writ of Error of May 14, 1985, at 54.)[3]

On July 3, 1985, the Supreme Court of Texas refused Petitioners' Application for Writ of Error and entered the following order:

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3. Petitioners' points of error respecting the procedural and substantive errors committed by Judge Walker could not be presented in the Supreme Court of Texas, for where a court of appeals dismisses an appeal, the Supreme Court of Texas will not consider any points of error regarding the merits, but only those relating to the incorrectness of the dismissal of the appeal. *See Bay v. Mecom*, 393 S.W.2d 819, 821 (Tex. 1965), *cert. denied*, 389 U.S. 927 (1967).

> Application of Petitioners for Writ of Error to the Court of Appeals for the Fifth Supreme Judicial District, together with Petitioners' Motion to Expedite Consideration, Respondents' Motion to Expedite Consideration, and Respondents' Motion to Strike Application, having been duly considered, it is ordered that said Motions to Expedite Consideraiton be, and hereby are, granted, and the Motion to Strike is overruled. Furthermore, the Court having determined that said Application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said Application be, and here is, refused.

In overruling Respondents' Motion to Strike Petitioners' Applications for Writ of Error and in refusing them with the notation "no reversible error," the Supreme Court of Texas rejected Respondents' contentions that Petitioners had failed to timely and properly invoke the Supreme Court's writ of error jurisdiction. (*See* Appendix F.)

On October 30, 1985, the Supreme Court of Texas overruled Petitioners' Motion for Rehearing and, in a related cause, stated that Petitioners' appeal had been dismissed by the Dallas Court of Appeals because Petitioners "had elected to simultaneously challenge the [trial court] judgment in federal court." *Browning v. Placke,* 698 S.W.2d 362 (Tex. 1985). (*See* Appendix G.)

Thus, aside from the jurisdictional question raised by the retired or visiting judge provision of the Remand Order and Stipulation and Agreement, Petitioners received no appellate review by any appellate court of the procedural and substantive errors committed by Judge Walker in rendering the $82,000,000 judgment against them.

REASONS FOR GRANTING THE WRIT

I. THE DISMISSAL OF PETITIONERS' APPEAL VIOLATES THE DUE PROCESS CLAUSE WHICH SECURES A LITIGANT'S RIGHT OF APPEAL AGAINST DISMISSAL WHERE THE JUDGMENT APPEALED FROM WAS RENDERED BY A BIASED AND CORRUPTED JUDGE FOLLOWING AN UNFAIR TRIAL IN THE COURT OF FIRST INSTANCE.

The Texas Constitution guarantees Texas litigants the right of appeal, which, in civil cases, is invoked by compliance with the applicable Texas Rules of Civil Procedure. *Eppstein & Co. v. Holmes & Crain,* 64 Tex. 560, 564-65 (1885). It is undisputed that Petitioners satisfied every procedural requirement imposed by the Texas Rules of Civil Procedure to invoke their Texas constitutional right of appellate review of the trial court judgment in this case, and that sufficient allegations of procedural and substantive errors, particularly the allegations that Petitioners were denied their federal constitutional right to a fair trial before an impartial judge, were made.

Under *Griffin v. Illinois,* 351 U.S. 12, 16 (1956), this Court must accept as true Petitioners' contentions that they were denied a fair trial before an impartial judge, and that their appeal would have been sustained had it not been dismissed.[4] Hence, the question this Court should

4. The right to a fair and open hearing before a tribunal which meets at least currently prevailing standards of impartiality is an essential rudiment of fair play assured to every litigant by the federal Constitution. *Wong Yang Sung v. McGrath, Att'y Gen.,* 339 U.S. 33, 50 (1950); *See also Ward v. Village of Monroeville,* 409 U.S. 57, 62 (1972); *R.R. Comm'n of Cal. v. Pac. Gas & Elec. Co.,* 302 U.S. 388, 393 (1938).

answer is whether the State of Texas, acting through its Court of Appeals, could, without violating Petitioners' rights under the Due Process Clause of the Fourteenth Amendment, declare forfeited Petitioners' pending appeal from an unfair trial before a biased and corrupted judge because Petitioners unsuccessfully collaterally attacked the trial court judgment in federal court when Respondents sued them there to enforce it.

This Court has previously held in *Lindsey v. Normet,* 405 U.S. 56, 77 (1972) and *Ohio ex rel. Bryant v. Akron Metropolitan Park District,* 281 U.S. 74, 80 (1930) that, under the Due Process Clause, a state need not provide appellate review of a judgment of a court of first instance *provided that* a full and fair trial on the merits was had in the court of first instance. These decisions make clear that the cases holding that an appeal is a matter of grace are based on the assumption that the thwarted appellant has already been accorded at least one fair hearing on the merits. It therefore follows from *Lindsey v. Normet* and *Ohio ex rel. Bryant v. Akron Metropolitan Park District* that where a fair trial on the merits before an impartial judge is *not* provided in the court of first instance, the Due Process Clause requires the state to provide the aggrieved litigant with the remedy of a hearing by way of appellate review.

In this case, the trial in the court of first instance was not only unfair, but a complete sham. In effect, there was a judgment rendered against Petitioners depriving them of their property without a hearing, for a hearing before a biased and corrupted judge amounts to no hearing at all. *See Windsor v. McVeigh,* 93 U.S. 274 (1876); *McVeigh v. United States,* 78 U.S. (11 Wall.) 259, 267 (1872). Judge Walker's relationship

with Respondents and his overwhelming prejudice against Petitioners was demonstrated repeatedly throughout the trial. Moreover, after the trial, the federal District Court for the Northern District of Texas ruled in Petitioners' § 1983 action against Judge Walker, Respondents and others, that Petitioners had produced competent summary judgment evidence that Judge Walker and one of the Respondents' counsel were engaged in a conspiracy against Petitioners to rig the outcome of the trial.[5] (*See* Appendix H.)

Petitioners' request for a writ of certiorari should be granted so that this Court can decide whether the Due Process Clause protected the Petitioners' appeal against dismissal where the judgment attacked on appeal was rendered by a biased and corrupted judge, whose conspiracy with Respondents denied Petitioners' their right to a fair hearing in the court of first instance.

II. THE DISMISSAL OF PETITIONERS' APPEAL VIOLATES THE DUE PROCESS CLAUSE WHICH SECURES A LITIGANT'S RIGHT OF APPEAL AGAINST DISMISSAL ON A NOVEL PROCEDURAL GROUND OF WHICH HE HAD NO PRIOR NOTICE.

Even where the Due Process Clause does not require a state to provide appellate review, this Court has held that once a state has granted its litigants a statutory

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5. The District Court, however, subsequently dismissed Petitioners' § 1983 action on the ground that under *Hudson v. Palmer*, ____U.S.____, 94 S. Ct. 3194 (1984), they had not stated a violation of the Due Process Clause in view of remedies available to Petitioners under Texas law. Ironically, the primary state remedy held to exist was Petitioners' right of appeal in the Texas appellate courts.

right of appeal, "these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Rinaldi v. Yeager*, 384 U.S. 305, 310 (1966); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 430, n. 5 (1982); *Williams v. Oklahoma City*, 395 U.S. 458, 459 (1969); *Griffin v. Illinois*, 351 U.S. 12 (1956); *Lindsey v. Normet*, 405 U.S. 56 (1972). In enforcing that principle, this Court has held that a state may not by novel procedural law, or by a new or highly technical application of established procedural rules, announced for the first time in the litigant's case, deny that litigant his statutory right to an appeal. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 454-58 (1958); *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-82 (1930). *See also Gilbert v. Sowders*, 646 F.2d 1146, 1147 (6th Cir. 1981) (Dismissal of appeal held arbitrary, capricious, and an abuse of due process where dismissal arose out of highly technical procedural rule).[6] In *Bouie v. City of Columbia*, 378 U.S. 347 (1964), this Court, *quoting* from *Brinkerhoff*, stated:

> When a state court overrules a *consistent* line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard to defend [his] substantive right." (Emphasis added.)

378 U.S. at 354.

Here, the basis for dismissing Petitioners' appeal, as the Supreme Court of Texas makes clear in *Browning*

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6. This Court has also held that an unforeseeable and unsupported state court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question—here, the right to a fair trial before an impartial judge. *Bouie v. City of Columbia*, 378 U.S. 347 (1972).

v. Placke, was that Petitioners elected to challenge Judge Walker's judgment simultaneously in federal district court and in the Dallas Court of Appeals, and thus, under the doctrine of election of remedies, forfeited their state court appeal, even though Petitioners' collateral attack in federal court ultimately failed. Prior to the decision of the Dallas Court of Appeals in this case, however, no reported decision of a Texas appellate court had ever dismissed, or upheld the dismissal of, an appeal on the election of remedies doctrine (or any other theory) where the appellant sought to prevent enforcement of an unsuperseded trial court judgment by unsuccessfully collaterally attacking that judgment in federal court when the appellee filed suit against the appellant to enforce it.[7]

To the contrary, the Texas courts held that there was no election of remedies "when one first unsuccessfully pursues a right or remedy which proves unfounded and then pursues the one that is allowed." *Bocanegra v. Aetna Life Insurance Co.*, 605 S.W.2d 848, 852 (1980).[8]

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7. *See Guar. Trust & Safe Deposit Co. v. Buddington*, 24 Fla. 21, 3 So. 418, 420 (1888) (Florida Supreme Court refused to dismiss trust company's appeal even though trust company mistakenly sought to have federal court hold state proceedings void for lack of personal jurisdiction).

8. In the courts below, Respondents relied heavily on the decision of *Winters Mut. Aid Ass'n Circle No. 2 v. Reddin*, 49 S.W.2d 1095 (Tex. Comm'n App. 1932, holdings approved) as support for the election of remedies theory of dismissal. That case, however, unlike this one, did *not* involve a collateral attack on a judgment in federal court, but a *direct* attack by way of bill of review in state court. While *Winters Mut.* may provide persuasive authority for an election of remedies between the *direct* remedies of an appeal and a bill of review where the ground relied upon in the bill of review could have been presented in the appeal, that is not the issue in this case. *Winters Mut.* provided Petitioners with no notice that they were endangering their appeal by *collaterally* attacking the trial court judgment in federal court.

In particular, the Texas appellate courts consistently held that where a litigant erroneously selected a court without the power to grant the relief sought or where the litigant chose a supposed remedy that did not exist and pursued it until the courts ruled that it never existed, there was no election of remedies barring that litigant's suit in the proper court. *Employers' Casualty Co. v. Rockwall County*, 120 Tex. 441, 35 S.W.2d 690, 693 (1931); *Cobb & Gregory v. Parker*, 236 S.W. 1108, 1110 (Tex. Comm'n App.—1922, judgmt adopted). *Harris v. Keoun*, 135 S.W.2d 194, 196 (Tex. Civ. App. —Waco 1939, writ ref'd); *Railroad Commission v. Shell Oil Co.*, 170 S.W.2d 568, 570 (Tex. Civ. App.—El Paso 1942, writ ref'd w.o.m.); *A. E. Swift & Sons, Concrete Contractors, Inc. v. Sam Sanders, Inc.*, 405 S.W.2d 402, 405-06 (Tex. Civ. App.—Amarillo 1966, no writ); *Falsetti v. Lowman*, 405 S.W.2d 796 (Tex. Civ. App.— Eastland 1966, writ ref'd n.r.e.). Under these principles, the doctrine of election of remedies was specifically rejected in *Burford v. Sun Oil Co.*, 186 S.W.2d 306, 309 (Tex. Civ. App.—Austin 1944, writ ref'd w.o.m.) where a litigant had unsuccessfully pursued a remedy in the federal courts and then filed suit in state court.[9]

Until this case, these rules were followed by the Dallas Court of Appeals. *See Henson v. Grayford Oil Corp.*

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9. Under prior Texas law, an election of remedies could only have occurred here if the federal District Court's summary judgment had been *upheld* by the federal appellate courts. *See Bridges v. Wilder*, 80 S.W.2d 1081, 1082 (Tex. Civ. App.—Beaumont 1935, no writ); *Dorenfield v. State ex rel. Allred*, 123 Tex. 467, 73 S.W.2d 83, 89 (1934); *First Nat'l Bank of Fort Worth v. Kelley*, 278 S.W.2d 350, 351 (Tex. Civ. App.—Eastland 1955, no writ); *Humphrey v. Hendrick*, 88 S.W.2d 777 (Tex. Civ. App.—Dallas 1935, no writ); and *Price & Beaird v. Eastland Co. Land & Abstract Co.*, 211 S.W. 478, 480 (Tex. Civ. App.—El Paso 1919, no writ).

(*Oil & Gas Energy, Inc.*), 549 S.W.2d 7, 12 (Tex. Civ. App.—Dallas 1977, writ ref'd n.r.e.); *Metroflight, Inc. v. Shaffer*, 581 S.W.2d 704, 707-09 (Tex. Civ. App.—Dallas 1979, writ ref'd n.r.e.). *See also*, *Schwarz v. National Loan & Investment Co.*, 133 S.W.2d 133, 136 (Tex. Civ. App.—Dallas 1939, writ ref'd).[10]

Thus, Petitioners, as those in *Bouie v. City of Columbia*, *NAACP v. Alabama ex rel. Patterson*, and *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, were made the victims of a newly-announced principle of state law of which they had no notice before making their collateral attack in federal court. Consequently, Petitioners were relegated by the Dallas Court of Appeals to an unavailable and unfounded "federal remedy," which even if available could not have afforded them an appellate review of the non-jurisdictional errors committed by Judge Walker. *See* Dissent of Chief Justice Guittard, 690 S.W.2d at 330-32.

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10. The Dallas Court of Appeals' new application of the election of remedies doctrine was also announced despite the holding of this Court, in *Kalb v. Feuerstein*, 308 U.S. 433 (1940), that a judgment rendered by a state court of competent jurisdiction can be collaterally attacked on the ground that it was rendered in violation of the protection afforded debtors under the bankruptcy laws. Moreover, the law in Texas was well established that a party could collaterally attack a judgment claimed to be void for want of subject matter jurisdiction in any court, at any time, and in any place, when any right under that judgment was sought to be enforced. *Cotton v. Rea*, 106 Tex. 220, 163 S.W. 2, 4 (1914). Both the writing justice for the *en banc* majority (and a member of the panel) and the writing justice of the panel had even recognized this point in prior decisions. *See Boyd v. Gillmon Film Corp.*, 447 S.W.2d 759, 762-63 (Tex. Civ. App.—Dallas 1969, writ ref'd n.r.e.) (Williams, J.), and *Northwest Oil Co. v. R.R. Comm'n*, 462 S.W.2d 371, 376 (Tex. Civ. App.—Beaumont 1971, writ ref'd n.r.e.) (Keith, J.). Furthermore, the Texas appellate courts held that it was wholly unnecessary even to appeal from a void judgment in order to collaterally attack it, and if an appeal were taken, a collateral attack could be instituted after perfection of the appeal. *Fulton v. Finch*, 162 Tex. 351, 346 S.W.2d 823, 827 (1961); *Evans v. Young County Lumber Co.*, 368 S.W.2d 783, 786 (Tex. Civ. App.—Fort Worth 1963, writ dism'd).

The practical effect of the Dallas Court of Appeals' judgment of dismissal, together with the unfair trial before Judge Walker, deprived Petitioners of property worth over $50 million without having an opportunity to be heard and to present their defenses both in the trial court and in the appellate court. Petitioners submit that, under these circumstances, the dismissal of their appeal is in conflict with the opinions of this Court in *Bouie v. City of Columbia, NAACP v. Alabama ex rel. Patterson,* and *Brinkerhoff-Faris Trust & Savings Co. v. Hill* and has resulted in a deprivation of Petitioners' property by the State of Texas without due process of law.

III. THE DISMISSAL OF PETITIONERS' APPEAL VIOLATES THE DUE PROCESS CLAUSE, WHICH SECURES FROM STATE RETALIATION A LITIGANT'S EXERCISE OF HIS RIGHT OF ACCESS TO THE COURTS TO DEFEND HIMSELF WHEN SUED.

In preventing the state from arbitrarily and capriciously denying a statutory right of appeal, this Court has held that a litigant may not be punished merely because he defends himself or pursues some established remedy in making that defense, or otherwise exercises his legal rights, particularly in federal court. *Blackledge v. Perry,* 417 U.S. 21, 25 (1974); *North Carolina v. Pearce,* 395 U.S. 711, 724 (1969). *See also Boddie v. Connecticut,* 401 U.S. 371 (1971).

> Prior cases establish, first, that due process requires, at a minimum, that absent a countervailing state interest of overriding significance, *persons forced to settle their claims of right and duty through the judicial process* must be given a meaningful op-

> portunity to be heard. Early in our jurisprudence, this Court voiced the doctrine that [*w*]*herever one is assailed in his person or his property, there he may defend.*" *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876). *See Baldwin v. Hale*, 1 Wall. 223, (1864); *Hovey v. Elliott*, 167 U.S. 409, (1897). The theme that "due process of law signifies a right to be heard in one's defense," *Hovey v. Elliott, supra*, at 417, has continually recurred in the years since *Baldwin, Windsor*, and *Hovey*. (Emphasis added.) (Footnote omitted.)

Boddie, 401 U.S. at 317.

In *Boddie*, this Court plainly recognized the involuntary nature of a litigant's need to avail himself of the right of access to the Courts in order to defend himself. The Due Process Clause forbids state retaliation against litigants for defending themselves. A state may not therefore penalize its litigants for exercising their federal constitutional right of access to both the state and federal courts, which is guaranteed by the Due Process Clause. *See Bounds v. Smith*, 430 U.S. 817, 822 (1977); *Silver v. Cormier*, 529 F.2d 161, 163 (10th Cir. 1976); *Milhouse v. Carlson*, 652 F.2d 371, 373 (3rd Cir. 1981); *Robinson v. Beto*, 426 F.2d 797, 798 (5th Cir. 1970); *Boling v. National Zinc Co.*, 435 F. Supp. 18, 20 (N.D. Okla. 1976). *See also Wadley Southern Railway Co. v. Georgia*, 235 U.S. 651, 661 (1915); *Sutton v. County Court of Racine County*, 353 F. Supp. 716, 718 (E.D. Wis. 1973).

Here, Petitioners *defended* themselves by attacking the jurisdictional validity of the trial court judgment when Respondents sued them in federal court to enforce it.[11]

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11. Had Petitioners not attacked that judgment as violative of the Stipulation and Agreement's jurisdictional provisions, then *res judicata* may well have precluded them from attacking it on that ground in

The dismissal of Petitioners' appeal because they exercised their right to defend themselves in the federal court operates to chill the exercise of constitutional rights and is an unreasoned obstruction of their Texas constitutional and statutory right to appellate review in the Texas appellate courts. This Court should decide whether Texas litigants can be dragged into federal court and forced to remain silent because the State will punish them if they speak in their defense. Petitioners submit that the Due Process Clause forbids a state from conditioning its grant of appellate review upon the relinquishment of the appellant's federal constitutional right to defend himself wherever he is sued.[12] Because of this chilling, retaliatory, and obstructive effect, the Dallas Court of Appeals' decision is in conflict with *Boddie v. Connecticut* and *Blackledge v. Perry*.

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the Dallas Court of Appeals. *Falsetti v. Lowman*, 405 S.W.2d 796, 800 (Tex. Civ. App.—Eastland 1966, writ ref'd n.r.e.). This is so because in a suit to enforce a foreign judgment in federal court, once that judgment is properly authenticated, it is presumed to be jurisdictionally valid, and the burden is on the defendant to show that the judgment is invalid. *Sutton v. Lieb*, 342 U.S. 402, 408 (1952); *Cook v. Cook*, 342 U.S. 126, 128 (1951); *Adam v. Saenger*, 303 U.S. 59, 62 (1938). Petitioners sought to discharge this burden by showing that the retired and visiting judge provision of the Stipulation and Agreement had been violated and thus Judge Walker never acquired subject matter jurisdiction over Respondents' suit. Once the federal district court rendered a judgment on this jurisdictional issue, then Petitioners' Points of Error Nos. 14, 15, and 16 in the Dallas Court of Appeals became immaterial because the federal courts ultimately decided, adversely to Petitioners, the issue of the effect of the retired or visiting judge provision of the Remand Order and Stipulation and Agreement.

12. "Can it be doubted that due process of law signifies a right to be heard in one's defense?" *Hovey v. Elliott*, 167 U.S. 409, 417 (1897).

IV. THE DISMISSAL OF PETITIONERS' APPEAL VIOLATES THE DUE PROCESS CLAUSE, WHICH SECURES THE RIGHT OF APPEAL AGAINST DISTINCTIONS BASED ON FINANCIAL ABILITY.

A clear implication of the Dallas Court of Appeals' dismissal of Petitioners' appeal is that the State of Texas may permissibly dismiss an appellant's appeal in the Texas appellate courts if the appellant is financially incapable of posting a bond to suspend execution of a judgment and the appellee, taking advantage of that financial inability, brings an enforcement action, pending the appeal, thereby forcing the appellant either to make no defense to the enforcement action or make a defense and thus forfeit his appeal. This Court has held in criminal cases that the right to appellate review should not be foreclosed by the financial inability of the appellant. *See Griffin v. Illinois; Williams v. Oklahoma City.* Petitioners submit that this same rule is applicable to civil appellants.

This Court therefore should decide whether the State of Texas, acting through its Court of Appeals, violates the Due Process Clause by forcing a litigant, who is sued in federal district court to enforce a state court judgment that he lacks the financial means to supersede, to either forgo a possible defense related solely to the jurisdictional validity of a state trial court judgment or have his state court appeal, which attacks the procedural and substantive validity of that judgment, unconditionally dismissed.

V. THE DISMISSAL OF PETITIONERS' APPEAL ON THE GROUND OF POSSIBLE DELAY VIOLATES THE DUE PROCESS CLAUSE.

The Dallas Court of Appeals viewed Petitioners' collateral attack as a federal appeal from the trial court judgment, which, together with Petitioners' state court appeal, would cause Respondents an unendurable burden of delay if the state appeal were permitted to proceed. Apart from the fact that neither a federal district court nor a federal appeals court may entertain the merits of a state court judgment, *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 416 (1923), this Court has held that where, as here, fundamental rights to a fair hearing before an impartial tribunal are at stake, delay provides no excuse for denying review. *See Ohio Bell Telephone Co. v. Public Utilities Commission,* 301 U.S. 292 (1937).[13] Furthermore, an avoidance of delay in this type of case plainly does not rise to the level of a countervailing state interest of overriding significance justifying dismissal of Petitioners' appeal.

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13. In *Ohio Bell,* Justice Cardozo wrote that:

> All the more insistent is the need, when power has been bestowed so freely, that the "inexorable safeguard" (*St. Joseph Stock Yards Co. v. United States,* 298 U.S. 38, 73) of a fair and open hearing be maintained in its integrity . . . The right to such a hearing is one of 'the rudiments of fair play' (*Chicago M. & St. P. Ry. Co. v. Polt,* 232 U.S. 165, 168) assured to every litigant by the Fourteenth Amendment as a minimal requirement . . . There can be no compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harrassing delay, when that minimal requirement has been neglected or ignored. (Citations omitted.) 301 U.S. at 304-05

CONCLUSION

The Dallas Court of Appeals' dismissal of Petitioners' appeal from an enormous judgment rendered against them by a trial judge who was actively conspiring against them has deprived Petitioners of their property in violation of the Due Process Clause of the Fourteenth Amendment. Petitioners submit that they have been judicially punished by the Texas appellate courts *ex post facto* for availing themselves of a right which every litigant possesses: the right to defend oneself without fear of state retaliation *whenever* and *wherever* one is sued. The implications of the Dallas Court of Appeals' opinion and judgment are ominous. If that decision stands, litigants in Texas, particularly those with limited financial resources, or against whom an enormous judgment is rendered, will be forced to an unjust choice should they, as a defensive measure, attempt to collaterally attack an unsuperseded Texas judgment sought to be enforced in federal court while their appeal in the Texas appellate courts is still pending. No Texas litigant should be forced by a rule of procedure into a game of judicial Russian roulette wherein he must wager his constitutionally protected right of appeal in the state court as the price for exercising his federal constitutional right of access to the courts of the United States in order to make a defense to the action filed against him there. Here, the application of this new rule of forfeiture to Petitioners is particularly reprehensible since their property was taken from them by a corrupted judge in gross violation of their federal constitutional right to a fair trial before an impartial judge in the first instance—"the right that stands guardian over

all other rights." *Dennis v. United States,* 339 U.S. 162, 173 (1950) (Jackson, J. concurring).

Respectfully submitted,

REYNOLDS, ALLEN & COOK
Incorporated

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served by certified mail, return receipt requested, this 13th day of January, 1986, upon Mr. R. Jack Ayres, Jr., 4350 Beltway, Dallas, Texas 75244 and Mr. Joseph Geary, 2800 One Main Place, Dallas, Texas 75201.

J. Bruce Bennett
J. BRUCE BENNETT

APPENDIX

APPENDIX A

ane H. BROWNING, Individually and as Co-Independent Executrix of the Estate of William W. Browning Deceased, et al.,
Plaintiffs,

v.

Don NAVARRO, Individually and as Trustee For Pat S. Holloway, et al.,
Defendants.

Civ. A. No. 3-83-0380-H.

United States District Court,
N.D. Texas,
Dallas Division.

Dec. 5, 1983.

Suit was filed against bankruptcy trustee for refusal o comply with creditors' demands for immediate turn-ver of all debtors' assets to satisfy state court judgment hich was entered after bankruptcy court remanded case. he District Court, Sanders, J., held that the bankruptcy ourt did not exceed its authority in conditioning the odification of the automatic stay upon each party's ompliance with a stipulation and agreement, but when ne case was not tried pursuant to that order it was onducted in violation of the automatic stay and all roceedings in state court were void.

Ordered accordingly.

Michael W. Anglin, Passman, Jones, Andrews, Holl
& Co., Dallas, Tex., Lenard M. Parkins, Sheinfeld, Mal
& Kay, Houston, Tex., R. Jack Ayres, Jr., Dallas, Te
for plaintiffs.

Timothy J. Vineyard, Hunter, Vineyard, Drake
Miller, Dallas, Tex., for defendant Navarro.

MEMORANDUM OPINION AND ORDER

SANDERS, District Judge.

This case is before the Court on Plaintiffs' Motion
Partial Summary Judgment, Brief and Appendices
Support, filed June 23, 1983; Trustee's Response, Truste
Motion for Summary Judgment, Brief, and Eviden
filed August 2, 1983; Pat Holloway's Response, Moti
for Partial Summary Judgment, and Brief, filed Aug
2, 1983; Plaintiffs' Reply and Response, filed August
1983; Trustee's Brief in Response, filed September
1983; Pat Holloway's Reply, filed September 27, 19
Plaintiffs' Final Reply, filed October 5, 1983; and Truste
Reply, filed October 14, 1983.

Factual Background

On September 12, 1979, the Plaintiffs ("Browning
initiated a suit against Humble Exploration Co., I
("Humble"), Pat Holloway ("Holloway") and oth
in the 193rd Judicial District Court of Dallas Cou
Texas. This case was styled *Jane H. Browning, et al.*
Pat S. Holloway, et al., Cause No. 79-9623-L, hereinaf
referred to as the "1979 case" or the "state court cas
(Plaintiffs' Appendix A, Item 1; Trustee's Exhibit
In the state court case, the Brownings claimed, *inter a*
that they were equitable owners of substantially all

assets of Humble and Holloway. Specifically, the Brownings sought to impose a constructive trust on the state court defendants' assets, to collect actual and exemplary damages, and to appoint an interim receiver.

On November 19, 1979, Humble and Holloway filed voluntary bankruptcy petitions under Chapter 11 of the United States Bankruptcy Code. The petitions were assigned bankruptcy numbers BK 379-00664-G and BK 379-00665-G respectively. (Trustee's Exhibits 2 and 3).

On November 21, 1979, the Brownings initiated a suit against Sterling Pipeline Company in the 191st Judicial District Court of Dallas County, Texas. This case was styled *Jane Browning, et al. v. Sterling Pipeline Company*, Cause No. 79-12292-J. (Trustee's Exhibit 4). In the *Sterling* case, the Brownings alleged that Sterling was a wholly owned subsidiary of Humble, or, alternatively, controlled by Holloway, and that Sterling Pipeline Company was subject to the constructive trust sought by the Brownings in the initial 1979 state court case.

On November 19, 1979, Humble and Holloway removed the state court cases to the bankruptcy court pursuant to 28 U.S.C. § 1478(a). (Trustee's Exhibit 6).

On January 18, 1980, the Bankruptcy Court entered its "Order Remanding Causes of Action and Modifying Automatic Stay". (Plaintiffs' Appendix A, Item 8; Trustee's Exhibit 10). The Bankruptcy Court's Order specifically provides that:

> Cause No. 79-9623-L, styled *Jane Browning, et al. v. Pat S. Holloway, et al.*, and Cause No. 79-12292-J/L, styled *Jane Browning, et al. v. Sterling Pipeline Company*, be and hereby are remanded to the 193rd Judicial District Court of Dallas County, Texas, pur-

suant to the terms set out in the annexed Stipulation and Agreement as amended; and it is further ORDERED, ADJUDGED AND DECREED that the automatic stay provisions of Section 362 of the Bankruptcy Code are modified so as to permit the remand of said causes of action and the trial of same pursuant to the terms of the annexed Stipulation and Agreement as amended.

The document annexed to the Bankruptcy Court's Order is entitled "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated", and paragraphs one and two thereof specifically provide that:

1. Upon the approval of this Stipulation and Agreement, cause No. 79-9723-L styled *Jane Browning, et al. v. Pat S. Holloway, et al.*, in the 193rd Judicial District Court of Dallas County, Texas and Cause No. 79-12292-J/L in the 193rd Judicial District Court of Dallas County, Texas, styled *Browning, et al. v. Sterling Pipeline Company* shall be remanded for trial by the Bankruptcy Court to the 193rd District Court of Dallas County, Texas.
2. The BROWNING INTERESTS and Debtors shall then file an agreed motion in the 193rd Judicial District Court to consolidate cause No. 79-12292-J/L with cause No. 79-9623-L, so that upon consolidation the surviving consolidated cause shall be cause No. 79-9623-L. Upon the Court's signing of the order consolidating the said causes, the parties will then present a joint motion to the Judge of the 193rd District Court asking him to request of the Honorable Paul Peurifoy in his capacity as Presiding Judge of the First Administrative Judicial District that he assign a retired state court district judge or, in the alternative, a visiting state court district judge or a retired judge of the court of civil

appeals agreed to by the parties, to hear this consolidated cause and all motions and other matters in conjunction therewith.

Paragraph 3 of the annexed Stipulation provides that:

3. The order of the Bankruptcy Court remanding said consolidated cause to the state court for trial shall recite that such remand is conditional upon and shall only take effect upon the final assignment of said consolidated cause as prescribed in paragraphs 1 and 2 above. In the event that the BROWNING INTERESTS and Debtors are unable to obtain the assignment of said consolidated cause as prescribed in paragraphs 1 and 2 above, then in that event, the remand of said consolidated cause shall not take effect and the Bankruptcy Court shall retain jurisdiction over said cause which shall proceed to trial in the Bankruptcy Court before a jury.

Following remand, the two state court cases, Cause No. 79-9623-L and Cause 79-12292-J were consolidated as Cause No. 79-9623-L. (Trustee's Exhibit 5). On the same day, January 21, 1980, Judge Hugh Snodgrass of the 193rd District Court entered an "Order to Appoint Retired District Judge", which requested Presiding Judge Peurifoy to assign Cause No. 79-9623-L to a retired District Judge, (Trustee's Exhibit 11); the case was assigned by Judge Peurifoy to Judges Charles E. Long, a retired state district judge. Judge Long promptly ordered that a prior settlement agreement between the parties to the state court case be enforced. On appeal, the Court of Civil Appeals of Texas, Dallas, reversed and remanded the case for jury trial. *Browning v. Holloway*, 620 S.W.2d 611 (Tex. Civ. App.—Dallas), writ ref'd n.r.e. per curiam, 626 S.W.2d 485 (Tex. 1981).

Upon remand for trial, the case, *viz.* No. 79-9623-L, was assigned to Judge Fred Harless, a retired state district judge. Judge Harless ordered a separate trial on the settlement agreement and entered an instructed verdict for the Brownings that the prior settlement agreement was unenforceable and directed that the case proceed to trial on the merits. (Plaintiffs' Appendix A, Item 10; Trustee's Exhibit 12).

On May 27, 1982, a lawsuit was filed in Judge Dee Brown Walker's 162nd Judicial District Court of Dallas County, Texas, styled *Fairway Land Company, et al. v. Humble Exploration Company, Inc., et al.,* Cause No. 82-5742-I (hereinafter called the "*Fairway*" case or the "1982 case"). (Plaintiffs' Appendix A, Item 11; Trustee's Exhibit 13). The plaintiffs in the *Fairway* case were investors who claimed that Holloway and Humble wrongfully shut-in some 151 producing oil and gas wells jointly owned by the investors and Humble. The *Fairway* plaintiffs also wanted the state court to appoint a receiver for Humble's assets. The Brownings were named as defendants in the *Fairway* case since they claimed to own some interest in Humble's property.

On May 28, 1982, Humble filed a complaint in Bankruptcy Court to invoke the automatic stay and enforce the portion of the Bankruptcy Court's January 1980 Order which forbade appointing a receiver over Humble's assets. (Plaintiffs' Appendix A, Item 13; Trustee's Exhibit 15). Also on May 28, 1982, a receivership was imposed by the 162nd District Court on the assets of Humble and Holloway in the *Fairway* case. (Plaintiffs' Appendix A, Item 17).

On June 4, 1982, the Bankruptcy Court entered its

Order of Abstention and Dismissal of Adversary Proceeding, specifically stating:

> ORDERED, ADJUDGED AND DECREED (1) that this Court abstains in favor of the courts of the State of Texas with regard to the litigation now pending as Cause No. 82-5742-I in the 162nd District Court and with regard to all disputes relating to the issues raised in such litigation, including disputes or claims relating to any alleged breaches of Stipulations and Agreements heretofore approved and confirmed by this Bankruptcy Court by reason of or relating to such litigation; (2) that this Court expressly disassociates itself from the appointment of any Receiver appointed by the State Court, from his accountant or any of his employees, and all of the responsibility for their actions or failures to act in the proper administration of the properties of the parties shall be the sole responsibility of the State Court; (3) that the relief sought in Debtor's Complaint be denied without further action; and (4) that this Adversary Proceeding be and hereby is dismissed.

(Plaintiffs' Appendix A, Item 16: Trustee's Exhibit 16).

There then ensued a somewhat dizzying sequence of state orders. On June 7, 1982, Holloway and Humble filed a motion in the 193rd District Court where the 1979 case was pending before retired Judge Harless to consolidate that case (Cause No. 79-9263-L) and the *Fairway* case (Cause No. 82-5742-I) before Judge Harless. On June 8, 1982, the receiver appointed by the 162nd District Court in the *Fairway* case moved to consolidate the same two cases before Judge Dee Brown Walker in the 162nd District Court. In support of his motion to consolidate, the receiver cited Article 7.07(E) of the Texas Business Corporation Act, which provides:

E. A court authorized to appoint a receiver for a corporation to which this Act applies, and no other court in this State, shall be authorized to appoint a receiver for the corporation or its assets and business; When such a court does appoint a receiver, as authorized by this Act for the corporation or its assets and business, that court shall have exclusive jurisdiction of the corporation and all its properties, wherever situated.

On June 10, 1982, Judge Snodgrass entered an order in the 1979 case transferring that case from the 193rd District Court and retired Judge Harless to Judge Walker's 162nd District Court. (Plaintiffs' Appendix A, Item 20; Trustee's Exhibit 17). Also on June 10, 1982, Judge Walker of the 162nd District Court entered an order in the *Fairway* case consolidating the 1979 case and the *Fairway* case. (Plaintiffs' Appendix A, Item 20; Trustee's Exhibit 18).

On June 11, 1982, Judge Mead, the presiding judge of the Dallas County District Courts, entered an order declaring the June 10 orders of the 193rd and 162nd District Courts to be void and of no effect. (Plaintiffs' Appendix A, Item 23; Trustee's Exhibit 19). Also on June 11, 1982, Judges Snodgrass and Walker, of the 193rd and 162nd District Courts respectively, entered a joint order requiring the 1979 case and the *Fairway* case to be tried before Judge Walker. (Plaintiffs' Appendix A, Item 21; Trustee's Exhibit 20). Neither Judge Snodgrass or Judge Walker was a retired or visiting judge at any time relevant to this controversy.

On June 12, 1982, Judge Dan Gibbs, presiding judge of the Dallas County District Courts entered an order vacating Judge Mead's June 11, 1982, Order. (Plaintiffs' Appendix A, Item 25; Trustee's Exhibit 21).

On June 24, Judge Walker granted the Brownings' request for an expedited trial of the 1979 case and jury trial began twelve days later, on July 6, 1982. Judgments were entered on August 26, 1982, and November 11, 1982, in the 1979 case.

On October 5, 1982, the Bankruptcy Court enjoined the state court receiver from carrying out the state court judgment until the judgment became final. (Plaintiffs' Appendix A, Item 35; Trustee's Exhibit 30). On October 12, Holloway converted his personal Chapter 11 proceeding to a Chapter 7 proceeding, which resulted in the appointment of a trustee in both the Humble and Holloway proceedings. (Plaintiffs' Appendix A, Items 36 and 37; Trustee's Exhibits 31, 32 and 33).

The Brownings have made demand upon the Trustee, Don Navarro, for the immediate turnover of all assets of Holloway and Humble to satisfy the state court judgment. The Trustee has refused to comply with the Brownings' demands. The Brownings filed this suit on March 2, 1983.

Contentions of the Parties

The Brownings advance several theories in support of their motion for partial summary judgment and in opposition to the Trustee's summary judgment motion. As stated in the Brownings' pleadings, the grounds for their motion are as follows:

> FIRST GROUND: The bankruptcy court and its Trustee have no jurisdiction over the property and assets in question because the bankruptcy court had no subject matter jurisdiction over the parties after the remand order since such "jurisdiction" was based solely and exclusively upon an agreement or stipulation of the parties.

SECOND GROUND: The bankruptcy court and its Trustee have no jurisdiction of this cause by virtue of the Remand Order of January 18, 1980 and the Abstention Order and Dismissal of Adversary Proceeding of June 4, 1982.

THIRD GROUND: The bankruptcy court and its Trustee have no jurisdiction over the property of the Browning Interests since such assets are not property of the estate of the debtor within the meaning of 11 U.S.C., Sec. 541(a) (1979).

FOURTH GROUND: If the bankruptcy court and its Trustee have any jurisdiction to maintain possession of or administer property adjudicated as belonging to the Browning Interests, they must comply with applicable state law during the pendency of a state court appeal or relinquish possession of the property.

FIFTH GROUND: Assuming the bankruptcy court and its Trustee retain some jurisdiction to possess or administer the property of the Browning Interests and that the bankruptcy court and its Trustee would not otherwise be required to comply with state law during the pendency of a state court appeal, the bankruptcy court and its Trustee are nonetheless contractually obligated to post supersedeas or turn the property over forthwith.

(Plaintiffs' Motion at 3-4).

In support of his Motion for Summary Judgment, and in opposition to Plaintiffs' Motion, the Trustee advances the following arguments:

1. The Bankruptcy Court's jurisdiction over enforcement of the state court judgment was not conferred by agreement of the parties but was retained by agreement of the parties and effected through the Order of Remand. . . .

2. The Remand Order reserved jurisdiction in the Bankruptcy Court; the Abstention Order applies to another lawsuit; and the Injunction is valid and binding upon the Plaintiffs. . . .

3. Whether the property in dispute is property of the estate is irrelevant to the issue of Bankruptcy Court jurisdiction; the Bankruptcy Court had jurisdiction over disputes involving the title to property claimed by the debtors, since such proceedings were related to the Title 11 cases. . . .

4. The Plaintiffs are not entitled to insist upon the Trustee's compliance with certain legal requirements regarding enforcement of the Judgment. . . .

5. The state court judgment is void and, therefore, unenforceable.

(Trustee's Brief).

Jurisdiction

As an initial matter, the Court takes notice of the fact that all actions of the courts and parties, as they relate to the motions for summary judgment, were taken prior to December 24, 1982—the final day of the stay of the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982). Accordingly, prior orders and jurisdiction of the Bankruptcy Court in this case are not affected by the *Marathon* decision.

The Court has power to hear this case pursuant to 28 U.S.C. § 1471, granting original jurisdiction to the district courts to hear all matters and proceedings in bankruptcy. Plaintiffs bring this action to correct alleged wrongdoings by the Defendants in violation of the United States Bankruptcy Code, 11 U.S.C. § 101 *et seq.* Plain-

tiffs also demand a jury trial. Specifically, the Brownings allege that the Trustee, Don Navarro, has violated his obligation as a trustee under 11 U.S.C. § 704 and 28 U.S.C. § 959(b).

The January 18, 1980 Order

[1] The Brownings initially attack the Bankruptcy Court's January 18, 1980, remand order. Section 1478 of Title 28, U.S.C. provides that:

> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

This section is applicable for the period from November 6, 1978, to April 1, 1984, by operation of Public Law 95-598, Title IV, § 405(b). The legislative history of section 1478(b) in no way limits the Bankruptcy Court's authority to remand. The Senate Report provides that:

> Subsection (b) permits the court in which a claim or cause of action has been removed to remand the claim or cause of action on any equitable ground. An order of the bankruptcy judge remanding a claim

> or cause of action is not reviewable by appeal or otherwise.

S. Rep. No. 95-989, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 5787, 5942.

The House Report similarly provides that:

> Subsection (b) permits the court to which the case is removed to remand the claim or cause of action removed on any equitable ground. A remand order is made unreviewable.

H. Rep. No. 95-595, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6403. Congress granted broad power to the bankruptcy courts to remand cases on any equitable ground. The legislative history in no way limits this remand power. Also notably absent from the statute is the requirement that the court can only remand when it discovers it lacks jurisdiction as is the case for district courts under 28 U.S.C. § 1447. The parties have presented no cases which indicate that 28 U.S.C. § 1478 should not be read as broadly as its language requires. It appears that the removal of the two state court cases, and the subsequent order of remand, *see* page 203 *supra,* is therefore authorized by statute.

[2] Section 362 of Title 11, United States Code, imposes an automatic stay of all judicial proceedings against debtors filing petitions in bankruptcy. Section 362(d), however, provides that:

> (d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay—

> (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
>
> (2) with respect to a stay of an act against property, if—
>
> (A) the debtor does not have an equity in such property; and
>
> (B) such property is not necessary to an effective reorganization.

The legislative history to section 362 sets forth Congress' reasoning in providing for an automatic stay.

> The automatic stay is one of the fundamental debtor protections provided by the bankruptcy laws. It gives the debtor a breathing spell from his creditors. It stops all collection efforts, all harassment, and all foreclosure actions. It permits the debtor to attempt a repayment or reorganization plan, or simply to be relieved of the financial pressures that drove him into bankruptcy.
>
> The automatic stay also provides creditor protection. Without it, certain creditors would be able to pursue their own remedies against the debtor's property. Those who acted first would obtain payment of the claims in preference to and to the detriment of other creditors. Bankruptcy is designed to provide an orderly liquidation procedure under which all creditors are treated equally.

House Report 95-595, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News 5963, 6296-6297. The House Report on the 1978 Bankruptcy Reform Act explains the intended scope of section 362(d).

> Subsection (d) requires the court, on request of a party in interest, to grant relief from the stay, such

> as by terminating, annulling, modifying, or conditioning the stay, for cause. The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, a desire to permit an action to proceed to completion in another tribunal may provide another cause. Other causes might include the lack of any connection with or interference with the pending bankruptcy case. . . . The facts of each request will determine whether relief is appropriate under the circumstances.

Id., at 6300. Section 362(d) commits the decision of whether to alter the automatic stay to the discretion of the bankruptcy judge. *Matter of Holtkamp,* 669 F.2d 505, 507 (7th Cir. 1982). Thus, the statute and the legislative history indicate that the Bankruptcy Court was to have considerable authority and discretion in fashioning the automatic stay to fit each bankruptcy proceeding.

[3] Section 105(a) of Title 11, U.S. Code, provides that, "The bankruptcy court may issue any order, process or judgment that is necessary or appropriate to carry out the provisions of this title." Furthermore, section 1481, Title 28, U.S. Code, provides that "A bankruptcy court shall have the powers of a court of equity, law, and admiralty. . . ." The House Report explains the purpose of section 1481:

> This section gives the bankruptcy court the powers of a court of equity, law, and admiralty. It is the concomitant of the bankruptcy courts increased jurisdiction, and is necessary to enable the bankruptcy court to exercise that jurisdiction and its powers under the bankruptcy code.
>
> It is in addition to any power granted under 28 U.S.C. 1651 (the All Writs Statute) or under section 105 of the bankruptcy code.

H. Report 95-595, 95th Cong., 2d Sess., *reprinted in* [1978] U.S. Code Cong. & Ad. News, 5963, 6404. Again, in plain terms, Congress grants the bankruptcy court sweeping authority to tailor its orders to meet the needs of bankruptcy proceedings.

[4] The Court examines the Bankruptcy Court's remand order in this case in light of these statutes and Congress' purpose and explanations thereof. Congress grants the bankruptcy court broad powers with these statutes. While the parties have extensively addressed the issues in this case, no precedent has been cited to the Court which explains, construes or suggests how these broad issues of the Bankruptcy Court's authority should be interpreted. The Court, after considerable research and reflection, and absent authoritative limiting construction, is bound to give the statutory provisions their full meaning in the context of the Bankruptcy Code. The Court concludes that the Bankruptcy Court's January 18, 1980, order remanding the 1979 state court case and modifying the automatic stay in accordance with, and conditioned upon compliance with, the stipulation and agreement submitted by the parties did not exceed the power of the bankruptcy court. The Court holds that the remand and the modification of the automatic stay were conditioned upon compliance with the stipulation and agreement, and that the stipulation was properly made a part of the remand order.

[5] Congress, in enacting section 1478(b), gave the bankruptcy courts the authority to remand "on any equitable ground". Thus, the bankruptcy court is apparently not bound by the District Court's more limited remand powers as set forth in 28 U.S.C. §§ 1447 and 1448. The Court is of the opinion that in this case, the parties'

stipulation and agreement as to the way in which the 1979 state court case was to be tried and the judgment, if any, was to be executed, constituted an equitable ground for remand. Furthermore, the Court is also of the opinion that the conditioning of the remand upon compliance with the stipulation and agreement, which was properly made a part of the remand order, was also an equitable ground for remand under the statute.

[6] In section 362(d), Congress specifically provides that a bankruptcy court can modify the automatic stay over state court proceedings, and that the bankruptcy court can condition the modification or lifting of the automatic stay. In this case, the Court holds that the Bankruptcy Court did not exceed its authority in conditioning the modification of the automatic stay upon each party's compliance with the stipulation and agreement. *Compare In re Dublin Properties,* 27 B.R. 506, 506-7 (Bkrtcy. E.D. Pa. 1983) (modification of automatic stay contingent upon parties' execution of a mortgage note); *In re Cosby,* 22 B.R. 682 (Bkrtcy. Pa. 1982) (modification of automatic stay can be conditioned on the debtor's payment of reasonable attorney fees and other costs); *In re Ideal Roofing and Sheet Metal Works,* 9 B.R. 2, 3 (Bkrtcy. S.D. Fla. 1980) (parties stipulated to modification of automatic stay to proceed with a state court case brought by the debtor, but involving a counterclaim against the debtor); *In re Patio, Ltd.*, 6 B.R. 518 (Bkrtcy. C.D. Cal. 1980) (relief from automatic stay can be conditioned on, among other things, a debtor's turning over rents collected by the debtor).

[7] The Court finds further support for the validity and effectiveness of the Bankruptcy Court's remand order in 11 U.S.C. § 105 and 28 U.S.C. § 1481 as set forth

above. As a court operating at equity and at law, the Bankruptcy Court had both the authority to remand the 1979 state court case for trial in compliance with the bankruptcy court's order and the authority to condition the modification of the automatic stay upon compliance with the order.

[8] The Plaintiffs here argue that even if the Bankrutcy Court's 1980 remand order was proper, the Bankruptcy Court's June 4, 1982, Order of Abstention ended all Bankruptcy Court jurisdiction over the 1979 state court case. However, the face of the Order of Abstention itself answers Plaintiffs' contentions. The Order states:

> [T]his court abstains in favor of the courts of the State of Texas with regard to the litigation now pending as Cause No. 82-5742-I in the 162nd District Court [the *Fairway* case] and with regard to all disputes relating to the issues raised in such litigation, including disputes or claims relating to any alleged breaches of Stipulations and Agreements heretofore approved and confirmed by this Bankruptcy Court by reason of or relating to such litigation. . . .

The Court concludes that the issues raised in the *Fairway* case did not relate to the issues raised in the 1979 state court case for purposes of the Order of Abstention.

Plaintiffs also contend that the transcript of the hearing before the Bankruptcy Court creates some ambiguity as to whether the Order of Abstention also applied to the 1979 state court case. The Court does not agree with Plaintiffs' reading of the transcript; in any event, the Court is of the opinion that any ambiguity in the hearing was laid to rest by the language of the Order of Ab-

stention. Thus, the Court holds that the Bankruptcy Court's June 4, 1982, Order of Abstention did not apply to the 1979 state court case.

[9] The remand and modification of the automatic stay having been properly agreed to by the parties, and effectively incorporated into the Order of the Bankruptcy Court, the Court must now examine whether there was compliance with the Bankruptcy Court's Order. The remand order specifically stated that remand was "pursuant to the terms set out in the annexed Stipulation and Agreement. . . ." The order also stated that "the automatic stay provisions of Section 362 of the Bankruptcy Code are modified so as to permit the remand of said causes of action and the trial of same pursuant to the terms of the annexed Stipulation and Agreement as amended." The stipulation and agreement provided that the state court case be assigned to a retired or visiting state district judge, and that the "remand is conditional upon and shall only take effect upon the *final* assignment of" the state court case to a visiting or retired state district judge. (Emphasis added.) Finally, and importantly, the stipulation provides that in "the event that the Browning interests and the Debtors are unable to obtain the assignment [of the 1979 state court case to a visiting or retired state district judge] . . . the remand . . . shall not take effect and the Bankruptcy Court shall retain jurisdiction over said cause which shall proceed to trial in the Bankruptcy Court before a jury."

There is no dispute that the 1979 state court case was tried before Judge Dee Brown Walker in 1982. It is also undisputed that Judge Walker was neither a retired nor a visiting state district judge when the case was tried before him. Thus, the case was not tried pursuant to the

Bankruptcy Court's valid January 18, 1980 Order, and was conducted in violation of the automatic stay of 11 U.S.C. § 362.

Accordingly, all proceedings before Judge Walker in the 1979 state court case, Cause No. 79-9623-L, styled *Jane Browning, et al. v. Pat S. Holloway, et al.,* are void.

The Court expresses no opinion whatsoever on the merits of the Brownings' claims. However, this Court is required by law to determine the scope and effect of federal statutes. This responsibility is not undertaken lightly. State court proceedings, regardless of their merit, which are taken in violation of the Congressionally mandated automatic stay in bankruptcy proceedings are void and without effect. *Borg-Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (5th Cir. 1982) (*see also* cases cited therein).

Having determined that the state court proceedings in the 162nd District Court are void, the Court does not need to address the Plaintiffs' remaining arguments. There being no further support for Plaintiffs' Motion for Partial Summary Judgment, the motion is hereby DENIED. As the state court proceedings are void as a matter of law and there being no genuine issues of material fact, Defendant Trustee's Motion for Summary Judgment is hereby GRANTED.

All pending motions to intervene are hereby DENIED. Any and all other relief sought by any party hereto and not herein granted is DENIED.

The Trustee will promptly submit a proposed Judgment for entry.

SO ORDERED.

APPENDIX B

HUMBLE EXPLORATION COMPANY, et al.,
Appellants,

v.

Jane H. BROWNING, et al., Appellees.

NO. 05-82-01378-CV.

Court of Appeals of Texas,

July 11, 1984

Rehearing Denied Sept. 7, 1984.

On motion to dismiss an appeal from the 162nd District Court, Dallas, County, Dee Brown Walker, J., the Court of Appeals, Keith, J., (Retired), sitting by designation, held that where by stipulation it was condition of remand to state court from bankruptcy court that case be tried before different judge from the one previously presiding, and parties permitted case to go to judgment in state court without judge being notified of such condition, defect was not jurisdictional, but was, rather matter of procedure, waived unless presented in trial court, and party against whom such judgment was rendered could not have it set aside on appeal on ground that court lacked jurisdiction to render it.

Motion to abate appeal overruled, and motion to dismiss appeal granted.

Louis P. Bickel, Bickel & Case, Douglas M. Robison, Geary, Stahl & Spencer, Dallas, Joe H. Reynolds, Kay K. Daniel Pierce, and J. Bruce Bennett, Reynolds, Allen & Cook, Houston, for appellants.

G. H. Kelsoe, Jr., Kelsoe & Kelsoe, R. Jack Ayres, Jr., Joseph W. Geary, Geary, Stahl & Spencer, Dallas, for appellees.

Before GUITTARD, C.J., and WILLIAMS,[1] and KEITH,[2] JJ. (Retired).

KEITH, Justice (Retired).

Pat Holloway, Humble Exploration Company, Inc., and others appeal from a multi-million-dollar judgment in favor of Jane Browning and her children in a suit for damages for fraud and breach of fiduciary duties and for imposition of a constructive trust on certain corporate stock and producing mineral interests. Although the appeal is ripe for decision, none of the parties wish it to proceed at this time. Appellees have moved to dismiss the appeal on the ground that appellants have obtained in a federal court a summary judgment declaring that the judgment appealed from is void under federal law. Appellants request that the appeal be abated until a final decision is rendered on appeal from the summary judgment in the federal court. We overrule the motion to abate and grant the motion to dismiss.

The unseemly conflict between the courts of the state and federal system began when one of the appellants

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1. Chief Justice, Fifth Court of Appeals (Retired), sitting by designation pursuant to TEX. REV. CIV. STAT. ANN. art. 1812 (Vernon Supp. 1984).

2. Justice, Ninth Court of Appeals (Retired), sitting by designation pursuant to TEX. REV. CIV. STAT. ANN. art 1812 (Vernon Supp. 1984).

sought refuge in Chapter 11 bankruptcy proceedings after the institution of the suit by the plaintiffs below. This, of course, invoked the automatic stay of proceedings under Section 362 of the Bankruptcy Code. Later, the parties entered into a stipulation and the Bankruptcy Court entered its "Order Remanding Causes of Action and Modifying Automatic Stay."

We quote from such order of the Bankruptcy Court:

> Cause No. 79-9623-L, styled *Jane Browning et al. v. Pat S. Holloway, et al.*, and Cause No. 79-12292-J/L, styled *Jane Browning, et al. v. Sterling Pipeline Company*, be and hereby are remanded to the 193rd Judicial District Court of Dallas County, Texas, pursuant to the terms set out in the annexed Stipulation and Agreement as amended; and it is further ODERED, ADJUDGED AND DECREED that the automatic stay provisions of Section 362 of the Bankruptcy Code are modified so as to permit the remand of said causes of action and the trial of same pursuant to the terms of the annexed Stipulation and Agreement as amended.

The document annexed to the Bankruptcy Court's Order is entitled "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated," and paragraphs one and two thereof specifically provide that:

1. Upon the approval of this Stipulation and agreement, cause No. 79-9723-L styled *Jane Browning, et al. v. Pat S. Holloway, et al.*, in the 193rd Judicial District Court of Dallas County, Texas and cause No. 79-12292-J/L in the 193rd Judicial District Court of Dallas County, Texas, styled *Browning, et al. v. Sterling Pipeline Company* shall be re-

manded for trial by the Bankruptcy Court to the 193rd District Court of Dallas County, Texas.

2. The BROWNING INTERESTS and Debtors shall then file an agreed motion in the 193rd Judicial District Court to consolidate cause No. 79-12292-J/L with cause No. 79-9623-L, so that upon consolidation the surviving consolidated cause shall be cause No. 79-9623-L. Upon the Court's signing of the order consolidating the said causes, the parties will then present a joint motion to the Judge of the 193rd District Court asking him to request of the Honorable Paul Peurifoy in his capacity as Presiding Judge of the First Administrative Judicial District that he assign a retired state court district judge or, in the alternative, a visiting state court district judge or a retired judge of the court of civil appeals agreed to by the parties, to hear this consolidated cause and all motions and other matters in conjunction therewith.

Paragraph 3 of the annexed Stipulation provides that:

3. The order of the Bankruptcy Court remanding said consolidated cause to the state court for trial shall recite that such remand is conditional upon and shall only take effect upon the final assignment of said consolidated cause as prescribed in paragraphs 1 and 2 above. In the event that the BROWNING INTERESTS and Debtors are unable to obtain the assignment of said consolidated cause as prescribed in paragraphs 1 and 2 above, then in that event, the remand of said consolidated cause shall not take effect and the Bankruptcy Court shall retain jurisdiction over said cause which shall proceed to trial in the Bankruptcy Court before a jury.

Notwithstanding the quoted language, the parties went to trial before a regular active district judge of Dallas

County, Texas, and not before a retired or visiting state court district judge. In our large record, we do not find that appellants presented the order to Judge Walker in whose court the litigation was tried before a jury and the judgment entered from which an appeal has been taken to the federal district court, as noted earlier, and to this court.

There is no suggestion in our record that appellants did not realize, during the course of the lengthy trial, that the trial court was not proceeding with full and unchallenged authority to render a valid final judgment based upon jury findings. After the entry of the judgment and the commencement of the state appellate process plaintiffs sought to require appellants to file a supersedeas bond or deliver the specific property to which they recovered title in the trial court. When appellees went into the Bankruptcy Court for an order enforcing their judgment, appellants attacked the judgment as void. For the first time, so far as our record shows, they asserted that the 162nd District Court lacked jurisdiction because one of the provisions of the stipulation on which the case was remanded by the Bankruptcy Court was not observed, namely, the provision that the case be assigned to a retired or visiting judge. On this ground the United States District Judge rendered summary judgment declaring the judgment void and refusing to enforce it. *Browning v. Navarro,* No. 83-0380 (N.D. Tex. Dec. 5, 1983).

Although we recognize, as we must, the authority of the federal court, and we defer to its interpretation of the applicable federal law, we conclude that appellants are barred from further relief in the state courts by obtaining nullification of the judgment in the federal court on a ground they failed to raise in the state court. Appellants

have likened the conditions upon which the case was remanded to a "leash" which the bankruptcy court could at any time, use to return the case to the bankruptcy court, regardless of its status in the state system and without raising the matter in the state court.[3] Judge Sanders' opinion seems to support this interpretation.

If this interpretation is upheld, we must recognize it as the applicable federal law, but, as a matter of state law, we are not bound to permit parties to trifle with state courts in this fashion. Here appellants wholly failed to present the order of remand or the stipulation on which it was based to the trial court in the present suit. The record before us shows only that in a different suit, a receivership proceeding initiated by other parties, in which appellants and appellees were co-defendants, appellees attached the order of remand and the stipulation as exhibits to their pleading and asked the court to decide whether the receivership suit could properly proceed. Appellants advised the court that the present suit was then pending before a retired judge in another state court. Later appellants objected to consolidation of the two suits, but made no objection that Judge Walker, in whose court the consolidated suit went to trial, was without authority to try the case because of the condition of the order of remand. There is no suggestion in the record that after the consolidation appellants ever moved Judge Walker to recuse himself and request assignment of a retired or visiting judge. Judge Walker, therefore, had no opportunity to comply with the condition of remand.

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3. In oral argument, appellants' counsel likened the remand order to a "remand on a leash" whereby the Bankruptcy Court could, at any time, grasp the leash and return the dispute to that court regardless of its status in the state system. We do not comment upon this concept of law governing remands from the Bankruptcy Courts.

So far as the record of the present case shows, appellants chose to try the case to a jury before Judge Walker and made no suggestion of his lack of authority until after an adverse verdict was returned and an adverse judgment was rendered. Having thus chosen to speculate on the verdict in a trial before Judge Walker, and having lost, appellants should not be permitted to pursue their appeal in this court, asserting 211 points of error in a brief of more than five hundred pages, while, at the same time, advancing their "leash" theory in the federal court.

[1] We recognize that lack of jurisdiction of the subject matter cannot be waived and may be raised on appeal for the first time. *Texas Employment Commission v. International Union of Electrical, Radio and Machine Workers, Local 782*, 163 Tex. 135, 352 S.W.2d 252, 253 (1961); *Long v. Fox*, 625 S.W.2d 376, 379 (Tex. App. —San Antonio 1981, writ ref'd n.r.e.). The complaint here, however, is not a lack of jurisdiction of the 162nd District Court over the general subject matter of the suit, or even preemption of state jurisdiction by bankruptcy proceedings. The claimed jurisdictional defect is the court's failure to proceed in the manner specified by the order of remand, namely, before a retired or visiting judge instead of the constitutionally elected and presiding judge of the court. Under Texas law the disqualification of the judge on a ground other than those specified in the constitution is waived if not raised by a proper motion to recuse. *Buckholts Independent School District v. Glaser*, 632 S.W.2d 146, 148 (Tex. 1982). Thus, in *Buckholts*, although a statute governing election contests provided that the district judge must request assignment of a judge from outside the county to try the case, this requirement was held to be waived in the absense of a motion to recuse. *Id.* at 148.

[2] In the present case, apparently, the 162nd District Court would have had full jurisdiction if a retired or visiting judge had been on the bench. We conclude that under Texas law this is not the type of lack of jurisdiction that may be raised on appeal when it has not been raised in the trial court. It is rather a matter of procedure which is waived unless presented in the trial court so that the error may be avoided or corrected. *See Pirtle v. Gregory,* 629 S.W.2d 919, 920 (Tex. 1981); *PGP Gas Products Inc. v. Fariss,* 620 S.W.2d 559, 561 (Tex. 1981).

It is difficult to foresee what other variations from state procedures the bankruptcy court may require as conditions of remand. If the "leash" theory is upheld, state court judgments in such cases would be subject to two types of review for procedural errors, one in the state court system according to state law, and another in the federal court on grounds that need not be raised in the state court and that may be contrary to state rules of procedure. These two types of review are fundamentally inconsistent. To allow both would be to permit a party to trifle with the state court by allowing it to proceed to a judgment which he may accept or reject at will. Consequently, we hold that if a party seeks review in the federal court of a state court judgment on the ground of an alleged violation of a condition of remand from bankruptcy court without pointing out the alleged error in the state court, he is barred from further relief under state law. Having elected an inconsistent remedy in the federal court, he is confined to the relief available there.

Since the appeal must be dismissed, we do not reach the question of whether a remand from the bankruptcy court on conditions permitting the state court proceeding to be interrupted and nullified at any stage would

deprive the state court of the power to make a conclusive determination of the controversy and, therefore, reduce its judgment to an advisory opinion, which Texas courts have no power to render. *See United Services Life Insurance Co. v. Delaney,* 396 S.W.2d 855, 863 (Tex. 1965). If the "leash" theory is upheld, the state court should determine in cases remanded from the bankruptcy court whether the conditions of the remand are consistent with the state court's jurisdiction under state law.

Neither can we agree with appellants' contention that this appeal should be abated and its final disposition delayed until the validity of the judgment is finally determined in the federal courts. The delay of justice resulting from even one appeal is a hardship for the parties that can be tolerated only as an indispensable condition of a system of justice based on law. Review of the same judgment in both federal and state systems is a twofold hardship that we are unwilling to impose. Nor can we justify proceeding with this appeal when the judgment under review has been declared void by the federal court. Consequently, we conclude that appellants should be limited to their remedy in the federal court. *Saner-Whiteman Lumber Co. v. Texas & N.O. Ry. Co.,* 288 S.W. 127 (Tex. Comm'n App. 1926, holding approved).

We overrule appellants' motion to abate the appeal and grant appellees' motion to dismiss the appeal.

Appeal dismissed.

APPENDIX C

Jane H. BROWNING, Individually and as co-independent executrix of the Estate of William W. Browning, Jr., Deceased, et al.,
Plaintiffs-Appellants,

v.

Don NAVARRO, Individually and as Trustee For Pat S. Holloway, et al.,
Defendants-Appellees.

No. 84-1083.

United States Court of Appeals,
Fifth Circuit.

Oct. 1, 1984.

Rehearing and Rehearing En Banc Denied Nov. 7, 1984.

Plaintiffs' state suit for imposition of constructive trust on defendants' assets had been removed to Bankruptcy Court after defendant filed Chapter 11 petition, but was subsequently conditionally remanded to state court. After initial judgment was reversed, state court eventually entered judgment in favor of plaintiffs, and plaintiff filed federal action to enforce state judgment. The United States District Court for the Northern District of Texas, Barefoot Sanders, J., 37 B.R. 201, entered summary judgment in favor of trustee, ruling that state court judgment was void for not being tried in accordance with remand order, and plaintiff appealed. The Court of Appeals, Randall, Circuit Judge, held that terms of

remand order conditioning remand upon "final assignment" of case to visiting or retired state judge were sufficiently carried out by initial assignment to and trial before retired state judge, and when resulting judgment was subsequently reversed on appeal, second trial before active state judge did not divest state court of jurisdiction over matter.

Reversed and remanded.

Law Offices of R. Jack Ayres, Jr., P.C., R. Jack Ayres, Jr., Thomas V. Murto, III, Kenneth F. Nye, Winstead, McGuire, Sechrest & Minick, P.C., Jay J. Madrid, Dallas, Tex., for plaintiffs-appellants.

G. Leroy Street, Gerald P. Urbach, Dallas, Tex., for Robbie Holloway.

Pat S. Holloway, Giddings, Tex., pro se.

Timothy J. Vineyard, Michael R. Cooper, Dallas, Tex., for Navarro, et al.

Appeal from the United States District Court for the Northern District of Texas.

Before TIMBERS,* POLITZ and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

The plaintiffs filed suit in the district court to enforce a state court judgment imposing a constructive trust on the defendants' assets and awarding $72,000,000 in damages for breach of fiduciary duty and fraud. Holding that

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* Circuit Judge of the Second Circuit, sitting by designation.

the state court case was not tried in accordance with a bankruptcy court remand order and that the state court proceedings leading to the judgment were conducted in violation of the automatic stay, the district court granted the defendants' motion for summary judgment and declared the state court proceedings void. Because we hold that the parties complied with the bankruptcy court's remand order, that the stay was lifted, and that the resulting state court judgment was not void, we reverse the district court's judgment and remand the case.

I. Factual and Procedural Background.

Although the district court has set out in its opinion[1] the rather complex factual and procedural posture of this case, we recount here the pertinent events leading to this appeal.

On September 12, 1979, the plaintiffs ("Brownings") filed suit against Humble Exploration Co., Inc. ("Humble"), Pat Holloway ("Holloway"), and others in the 193rd Judicial District Court of Dallas County, Texas, seeking, as the alleged equitable owners of substantially all of the assets of Humble and Holloway, the imposition of a constructive trust on Humble's and Holloway's assets, actual and exemplary damages, and the appointment of an interim receiver to manage the disputed assets. (This case is hereinafter referred to as the "1979 case.") On November 19, 1979, Humble and Holloway filed Chapter 11 voluntary bankruptcy petitions and removed the 1979 case to the United States Bankruptcy Court for the Northern District of Texas ("Bankruptcy Court") pursuant to 28 U.S.C. § 1478(a).

1. *Browning v. Navarro*, 37 B.R. 201, 203-06 (N.D. Tex. 1983).

On November 21, 1979, the Brownings sued Sterling Pipeline Company ("Sterling") in the 191st Judicial District Court of Dallas County, alleging that Sterling was a wholly owned subsidiary of Humble or controlled by Holloway and therefore subject to the constructive trust sought in the 1979 case. The Sterling case was subsequently consolidated with the 1979 case and removed to the Bankruptcy Court.

The parties entered a "Stipulation and Agreement on Manner in Which Controversy Shall Be Heard, Determined and Liquidated," which was approved by the Bankruptcy Court and annexed to the court's January 18, 1980 "Order Remanding Causes of Action and Modifying Automatic Stay." The remand order purported to remand the 1979 case and the Sterling case to the 193rd Judicial District Court pursuant to the terms of the stipulation and agreement and to modify the automatic stay to permit trial of the cases upon remand again subject to the terms of the stipulation and agreement. The stipulation and agreement provided, *inter alia,* that, upon remand of the cases to the 193rd Judicial District Court, the parties would file joint motions to consolidate the cases into the 1979 case and to request that the presiding judge of the administrative judicial district be asked to assign a visiting or retired state judge to hear the consolidated cases. Paragraph 3 of the stipulation and agreement provides:

> The order of the Bankruptcy Court remanding said consolidated cause to the state court for trial shall recite that such remand is *conditional upon and shall only take effect upon the final assignment* of said consolidated cause [to a visiting or retired state judge]. In the event that the BROWNING

> INTERESTS and Debtors [Humble and Holloway] are unable to obtain the assignment of said consolidated cause as prescribed . . . , the *remand* of said consolidated cause *shall not take effect* and the Bankruptcy Court *shall retain jurisdiction* over said cause which shall proceed to trial in the Bankruptcy Court before a jury.

(Emphasis added.)

The cases were remanded and consolidated and the presiding judge assigned the case to a retired state judge who ordered that a prior settlement agreement between the parties to the 1979 case entered in state court be enforced.[2] In 1981, the state court of appeals reversed and remanded the case for a jury trial and the Texas Supreme Court found no reversible error.[3] Upon remand, the 1979 case was assigned to a different retired state judge who entered an instructed verdict after a separate trial on the settlement agreement declaring the prior settlement agreement to be unenforceable. He then ordered that the case proceed to trial on the merits.[4]

On May 26, 1982,[5] a group of investors sued Holloway

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2. The parties had entered a settlement agreement the terms of which were dictated into the state court record on October 17, 1979. Before the agreement was reduced to judgment, however, the Brownings withdrew their consent to the agreement and the case was set for trial. *See Browning v .Holloway*, 620 S.W.2d 611, 614 (Tex. Civ. App.—Dallas), *writ ref'd n.r.e. per curiam*, 626 S.W.2d 485 (Tex. 1981).

3. *Id.*

4. The trial was set for September 1982. Record Vol. C, Exhibit 14, para. 2.

5. The district court erroneously indicated that suit was filed on May 27, 1982—an error of no consequence. *Compare* 37 B.R. at 204 *with* Record on Appeal at 415.

and Humble in the 162nd Judicial District Court of Dallas County, Judge Dee Brown Walker (an active state district judge) presiding, claiming that the defendants wrongfully shut-in some oil and gas wells jointly owned by the investors and Humble. The plaintiffs sought the appointment of a receiver over Humble's assets. (This case is hereinafter referred to as the "1982 case.") The Brownings were named as defendants in the 1982 case because of their claim to ownership of Humble's and Holloway's assets. The 1982 case was removed to the Bankruptcy Court and remanded on the same day. Believing that the Brownings, during a May 27 hearing on the 1982 case, had requested a receiver over the assets of Humble, Humble filed a complaint in Bankruptcy Court seeking enforcement of the Bankruptcy Court's January 18, 1980 order forbidding the appointment of a recevier over Humble's assets as a form of relief in the 1979 case. On May 28, 1982, the 162nd District Court appointed a receiver over Humble's and Holloway's assets that were the subject of dispute in the 1982 case.

On June 4, 1982, the Bankruptcy Court abstained from hearing the 1982 case pursuant to 28 U.S.C. § 1471(d).[6] Thereafter "ensued a somewhat dizzying sequence of state court orders" recounted by the district court, 37 B.R. at 205-06, which resulted in the transfer and consolidation of the 1979 case with the 1982 case before Judge Walker in the 162nd Judicial District. On June 24, the May 28 receivership order having been vacated by the state court of appeals,[7] Judge Walker granted the Brownings' request

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6. There is some dispute as to whether the Bankruptcy Court's abstention extended to the 1979 case as well.

7. *Humble Exploration Co. v. Fairway Land Co.*, 641 S.W.2d 934 (Tex. App.—Dallas), *enforced*, 641 S.W.2d 941 (Tex. App.—Dallas 1982, n.r.e.).

for a separate and expedited trial of the 1979 case. On August 26, 1982, after a month-long trial, judgment was entered in the 1979 case for the Brownings imposing the constructive trust on Humble's and Holloway's assets and awarding the Brownings actual and exemplary damages totalling $72,000,000.[8] Holloway and Humble appealed.

On October 5, 1982, the Bankruptcy Court enjoined the state court receiver from turning over the assets which were the subject of the state court judgment until that judgment became final. Humble's and Holloway's subsequent conversion of their Chapter 11 proceedings to Chapter 7 proceedings resulted in the appointment of a trustee, appellee Don Navarro ("Trustee"), over Humble's and Holloway's assets. When the Trustee refused to comply with the Brownings' demand to turn over assets in satisfaction of the state court judgment, the Brownings instituted the instant action on March 2, 1983, in the United States District Court for the Northern District of Texas, seeking an order to have Humble and Holloway post a supersedeas bond or, alternatively, turn over the assets. The Trustee filed a counterclaim, seeking an enforcement of the Bankruptcy Court's prior injunction against turning over the assets, further injunctive relief, and a declaratory judgment that the state court judgment was void. On December 5, 1983, the district court granted the Trustee's motion for summary judgment and declared void all proceedings before Judge Walker in the 1979 case.[9] After the district court denied its motion for a

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8. This judgment was amended by Judge Walker on November 11, 1982.

9. 37 B.R. at 210.

reconsideration and stay of its judgment, the Brownings filed this appeal. On January 17, 1984, the district court enjoined the Brownings from enforcing the state court judgment.

On July 11, 1984, after we heard oral argument in this case, a special panel of the Fifth District Court of Appeals of Texas dismissed Humble's and Holloway's appeal of the state court judgment, holding that "if a party seeks review in the federal court of a state court judgment on the ground of an alleged violation of a condition of remand from bankruptcy court without pointing out the alleged error in the state court, he is barred from further relief under state law."[10] The court of appeals reasoned that dismissal of the appeal was appropriate because a state appeal in addition to a federal appeal was a hardship that the parties need not be forced to bear and because it could not "justify proceeding with this appeal when the judgment under review ha[d] been declared void by the federal court."[11]

II. The District Court Opinion.

In a carefully reasoned opinion, the district court adopted a construction of the January 18, 1980 remand order of the Bankruptcy Court and the annexed stipulation and agreement that had the effect of voiding the state court judgment rendered in favor of the Brownings.

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10. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 at 114 (Tex. App.—Dallas 1984, no writ) (not yet reported). Holloway and the Trustee contend that it had been pointed out to Judge Walker that his trying the case was violative of the terms of the stipulation and agreement. Although we requested supplementation of the record at oral argument to substantiate or refute this contention, our disposition of the case does not require us to resolve this issue.

11. *Id.* at 115.

After establishing that the Bankruptcy Court's orders and jurisdiction in this matter remained unimpaired by the Supreme Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipeline Co.*, 458 U.S. 50, 102 S. Ct. 2858, 73 L.Ed.2d 598 (1982),[12] and that the district court was empowered to hear the case under 28 U.S.C. § 1471,[13] the district court examined the statutory basis for the Bankruptcy Court's remand order.

The district court observed that: (1) the legislative history of 28 U.S.C. § 1478[14] does not limit the broad remand power granted bankruptcy courts and, hence, does not circumscribe the Bankruptcy Court's authority to enter a remand order akin to the January 18, 1980 order; (2) the language and legislative history of 11

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12. Because "all actions of the courts and parties, as they relate to the motions for summary judgment, were taken prior to December 24, 1982—the final day of the stay of [*Marathon*]," the district court correctly noted that the Bankruptcy Court's jurisdiction was intact. 37 B.R. at 207.

13. Section 1471(a) vests district courts with original jurisdiction to hear all matters and proceedings in bankruptcy.

14. 28 U.S.C. § 1478 provides:

> (a) A party may remove any claim or cause of action in a civil action, other than a proceeding before the United States Tax Court or a civil action by a Government unit to enforce such governmental unit's police or regulatory power, to the bankruptcy court for the district where such civil action is pending, if the bankruptcy courts have jurisdiction over such claim or cause of action.
>
> (b) The court to which such claim or cause of action is removed may remand such claim or cause of action on any equitable ground. An order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise.

28 U.S.C. § 1478 (1982) (reenacted as amended at 28 U.S.C. § 1452). This section was operative for the transition period from November 6, 1978, to April 1, 1984. *See* Pub.L. No. 95-598, § 405(b), 92 Stat. 2549, 2685 (1978).

U.S.C. § 362(d),[15] 11 U.S.C. § 105(a),[16] and 28 U.S.C. § 1481[17] give the Bankruptcy Court the authority and discretion to fashion the automatic stay to the needs manifest in a particular bankruptcy proceeding. Giving full scope to these provisions, the district court concluded that the Bankruptcy Court did not exceed its powers by conditioning the remand of the 1979 case and modifying the automatic stay upon compliance with the stipulation and agreement of the parties. The district court then examined whether there had been compliance with the Bankruptcy Court's remand order, observing that the trial of the 1979 case before an active judge contravened certain provisions of the stipulation and agreement.[18] Because the 1979 case was tried contrary

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15. 11 U.S.C. § 362(d) provides:
(d) On request of a party in interest and after notice and a hearing, the court shall grant relief from the [automatic stay], such as by terminating, annulling, modifying, or conditioning such stay—
(1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or
(2) with respect to a stay of an act against property, if—
(A) the debtor does not have an equity in such property; and
(B) such property is not necessary to an effective reorganization.

16. 11 U.S.C. § 105(a) provides:
(a) The bankruptcy court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of [the bankruptcy laws].

17. 28 U.S.C. § 1481 provides:
A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge of the court or warranting a punishment of imprisonment.

18. The implication is that, because the 1979 case was ultimately tried on the merits by an active state judge, a "final assignment" of the cause to a retired or visiting state judge was not obtained and the remand never became effective.

to the terms of the Bankruptcy Court's January 18, 1980 order and in violation of the modified automatic stay, the district court declared void the proceedings leading to the state court judgment and granted the Trustee's motion for summary judgment.

III. Contentions of the Parties.

On appeal, the Brownings contend that the Bankruptcy Court was divested of all jurisdiction in the case upon entry of the remand order because (1) although a Bankruptcy Court may precondition or limit the scope of the remand, the effectiveness of a remand cannot depend on post-remand events, and (2) the Bankruptcy Court cannot review, much less revoke, a remand once issued. The Brownings also contend that the removal and remand of the 1979 case terminated the automatic stay which then could not be reactivated with respect to the same matter. In the alternative, they suggest that the automatic stay terminated thirty days after the Bankruptcy Court entered the remand order because the Brownings' request for a remand amounted to a request for relief from the automatic stay under 11 U.S.C. § 362(d), and the Bankruptcy Court failed to expressly continue the stay within the thirty days. The Brownings further argue that any attempt by the Bankruptcy Court to impose a condition on its remand order or on its modification of the automatic stay that dictates the qualifications of a trial judge to be selected by the state court is violative of various principles of federalism, including the reserved power of states to operate their judicial systems, comity, "Our Federalism," and the lack of federal supervisory authority over state courts. The Brownings allege that the district court misconstrued the intent

of the Bankruptcy Court's remand order and the annexed stipulation and agreement and that the parties' successful efforts to get a visiting or retired state judge assigned to the 1979 case in the first instance constituted a "final assignment" under the terms of the stipulation and agreement. The Brownings further contend that the Bankruptcy Court abstained on several occasions from deciding issues concerning the state court's jurisdiction over the 1979 case and that such abstention is not reviewable under 28 U.S.C. § 1471(d). Moreover, they argue, comity dictates that the district court should have abstained from deciding the validity of the state court judgment while that judgment was on direct appeal in the state system. Finally, the Brownings contend that the district court's injunction against enforcement of the state court judgment does not comply with Rule 65(d) of the Federal Rules of Civil Procedure because the injunction does not state the reason for its issuance or describe in reasonable detail the acts to be enjoined.

The Trustee contends that the Bankruptcy Court is vested with broad equitable powers in remanding a cause and modifying the automatic stay which would permit the court to condition its order in the manner contemplated by the stipulation and agreement, without such a conditional order constituting an impermissible interference with the operation of state courts. Because the automatic stay may only terminate under the conditions listed in 11 U.S.C. § 362, the Trustee argues, neither removal nor remand served to lift the automatic stay and the proceedings before an active state judge were in violation of that stay and are void. Moreover, the Trustee suggests that any judgment obtained in violation of the stay may be enjoined and the district court's order to

that end was in complete compliance with Rule 65(d) of the Federal Rules of Civil Procedure.

Holloway contends that the Bankruptcy Court had the equitable power to remand the case upon the condition that it be tried before a retired or visiting judge and to modify the automatic stay to permit such trial. He further contends that we cannot review the propriety of the Bankruptcy Court's order, that the remand order is void if the condition is held to be void, that the Bankruptcy Court's order does not represent an impermissible attempt to exercise supervisory power over state courts, and that comity is a "two-way street" mandating "that the state court honor the orders of the federal court approving the agreement of the parties that it not be tried before an active local judge."[19] Finally, Holloway argues that the Bankruptcy Court's February 22, 1980 confirmation of Humble's plan of reorganization, which incorporated the stipulation and agreement, should be given preclusive effect, rendering the provision that the Brownings' claims be tried before a retired or visiting state judge unassailable in this collateral proceeding.

[1] The parties agree that the stipulation and agreement is not subject to attack by any consenting party except on jurisdictional grounds.[20] The contentions of the

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19. Holloway's Brief at 1.

20. The Trustee contends that the Brownings cannot now attack, on other than jurisdictional grounds, an order to which they consented, citing *Swift & Co. v. United States*, 276 U.S. 311, (1928), *United States v. Bechtel Corp.*, 648 F.2d 660 (9th Cir.), *cert. denied*, 454 U.S. 1083, 102 S. Ct. 638, 70 L.Ed.2d 617 (1981), and *Seymour-Heath v. Goggin*, 389 F.2d 327 (9th Cir. 1968). *See also Haitian Refugee Center v. Civiletti*, 614 F.2d 92 (5th Cir. 1980) (defendants cannot appeal injunction to which they agreed). Although some of the Brownings' contentions are seemingly cast as attacks upon the remand order and the annexed stipulation and agreement, the Brownings

parties which raise issues necessary to our disposition of the case are addressed below.

IV. The Remand Order.

A. Reviewability.

[2-5] Section 1478(b) provides that "[a]n order under this subsection remanding a claim or cause of action, or a decision not so remanding, is not reviewable by appeal or otherwise." The legislative history of this provision offers no insight into its intended scope.[21] The purpose

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concede that a judgment to which they consented cannot be attacked by them. Reply Brief of Appellants at 2. We note in passing that a district court, or a bankruptcy court, exceeds its power if it enters a consent decree to which there was not actual consent or which was contrary to the public interest or was the result of a jurisdictional defect. *See* Note, *The Consent Judgment as an Instrument of Compromise and Settlement*, 72 Harv.L.Rev. 1314, 1316 (1959). In construing the stipulation and agreement, we pay heed to these restrictions on the power of a court to enter consent decrees.

21. *See* S.Rep. No. 989, 95th Cong., 2d Sess. 156, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5942 ("An order of the bankruptcy judge remanding a claim or cause of action is not reviewable by appeal or otherwise."); H.R.Rep. No. 595, 95th Cong., 1st Sess. 448, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6403 "(A remand order is made unreviewable.").

Under § 1478(b), a bankruptcy court has broad discretion to grant or deny a motion to remand a removed claim on any equitable ground, including: (1) forum non conveniens, 1 Collier on Bankruptcy ¶ 3.01, at 3-79 (15th ed. 1984); (2) a holding that, if the civil action has been bifurcated by removal, the entire action should be tried in the same court, *id.;* (3) a holding that a state court is better able to respond to questions involving state law, *id.;* (4) expertise of the particular court, *id.;* (5) duplicative and uneconomic effort of judicial resources in two forums, *In re U.S. Air Duct Corp.*, 8 B.R. 848, 854 (Bankr. N.D. N.Y. 1981); (6) prejudice to the involuntarily removed parties, *id.;* (7) comity considerations, *id.;* and (8) a lessened possibility of an inconsistent result, *id.* This is a much broader range of discretion than is permitted district courts in deciding whether to remand under 28 U.S.C. § 1447(d). District courts may order a remand under § 1447(d) only when (1) removal was improvident or (2) the court lacks jurisdiction. 28 U.S.C. § 1447

of making nonreviewable the bankruptcy courts' remand orders, or their decisions not to remand, was to avoid the delay that would result from litigating remand de-

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(c); *see Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336, 351-52, 96 S. Ct. 584, 593, 46 L.Ed.2d 542 (1976); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3739 (1976 & Supp. 1983). Interim Bankruptcy Rule 7004(j) provided that a bankruptcy court may remand a case if it had been improvidently removed or the court was without jurisdiction. The comment appended to the rule pointed up the rule's obvious derivation from § 1447(c). Interim Bankr. R. 7004(j), 11 U.S.C. (1982), *reprinted in* 1 Collier on Bankruptcy, *supra*, ¶ 3.01, at 3-77 (adopted as Local Bankr. R. 7004(j), effective January 1, 1983, by the United States Bankruptcy Court for the Northern District of Texas).

While a district court's decision *not* to remand under § 1447 is reviewable once a final, appealable order has been entered, a bankruptcy court's decision *not* to remand under § 1478 is nonreviewable. Moreover, a district court's order of remand *is* reviewable when based on grounds other than those provided in § 1447(c). *See Thermtron Products, supra*, 423 U.S. at 346, 96 S. Ct. at 590; *In re Shell Oil Co.*, 631 F.2d 1156 (5th Cir. 1980). The breadth of the equitable grounds on which a bankruptcy court may base its remand decision under § 1478(b) lessens the possibility that a *Thermtron*-type exception will be generated to permit limited review. Thus, a bankruptcy court's remand orders will not be subject to review even in cases where there has been an abuse of discretion. *See* Reed, Sagar & Granoff, *Subject Matter Jurisdictional, Abstention and Removal Under the New Federal Bankruptcy Law*, 56 Am. Bank. L. J. 121, 152 (1982); *cf. Hurt v. Cypress Bank*, 9 B.R. 749, 755 (N.D. Ga. 1981).

Nonreviewability extends only to the discretionary decision to remand or not to remand a properly removed action, not to whether the bankruptcy court originally had jurisdiction over the matter. *See, e.g., Flint v. Speir Insurance Agency, Inc.*, 33 B.R. 814, 816 (N.D. Ga. 1983) ("Where either subject matter jurisdiction or venue is lacking however, the decision should be reviewed."). There is no dispute in the instant case that the Bankruptcy Court had jurisdiction to act and the manner in which it acted is not subject to our review. In *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), the Third Circuit held that, § 1478(b) notwithstanding, it could review a remand order when the bankruptcy court lacked jurisdiction under § 1471(b) because the removed proceeding was not "related to" bankruptcy. In contrast, the instant action involves a decision by the Bankruptcy Court, having jurisdiction and in the exercise of its discretion, to remand the 1979 case.

cisions. 1 Collier on Bankruptcy ¶ 3.01, at 3-80.1 to 3-81 (15th ed. 1984); Reed, Sagar & Granoff, *Subject Matter Jurisdiction, Abstention and Removal Under the New Federal Bankruptcy Laws,* 56 Am. Bank. L.J. 121, 146 (1982).

[6] The statute plainly prohibits our review of a bankruptcy court's remand order on direct appeal. *In re Compton,* 711 F.2d 626 (5th Cir. 1983); *see also Shell Pipe Line Corp. v. West Texas Marketing Corp.*, 540 F.Supp. 1155 (S.D. Tex. 1982) (bankruptcy court's decision to remand under § 1478(b) not reviewable); 1 Collier on Bankruptcy, *supra,* ¶ 3.01, at 3-79; *cf. In re Potts,* 724 F.2d 47 (6th Cir. 1984) (bankruptcy court's refusal to remand not reviewable). This comports with the extensive jurisprudence under 28 U.S.C. § 1447(d),[22] an analogous rule contained in the general remand provisions establishing that remand orders of a district court are unreviewable on direct appeal.[23] *Briscoe v. Bell,* 432 U.S. 404, 97 S. Ct. 2428, 53 L.Ed.2d 439 (1977); *Volvo of America Corp. v. Schwarzer,* 429 U.S. 1331, 97 S. Ct. 284, 50 L.Ed.2d 273 (Rehnquist, Circuit Justice, 1976) (nonreviewability bar applies whenever a federal court remands on the basis of a remand statute even if the federal court was in error in applying the statute); *Gravitt*

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22. 28 U.S.C. § 1447(d) provides: "An order remanding a case to the State court from which it was removed is not reviewable on appeal or otherwise, except that an order remanding a case to the state court from which it was removed pursuant to [28 U.S.C. § 1443] shall be reviewable by appeal or otherwise."

23. There are two exceptions to this general prescription for nonreviewability of a district court's remand orders. Such orders are reable if (1) removal was pursuant to 28 U.S.C. § 1443, or (2) the remand order is issued on grounds not authorized by 28 U.S.C. § 1447(c). *See Thermtron Products, supra; Royal v. State Farm & Casualty Co.*, 685 F.2d 124 (5th Cir. 1982) (per curiam).

v. Southwestern Bell Telephone Co., 430 U.S. 723, 97 S.Ct. 1439, 52 L.Ed.2d 1 (per curiam), *reh'g denied*, 431 U.S. 975, 97 S. Ct. 2941, 53 L.Ed.2d 1073, *on remand* 556 F.2d 370 (5th Cir. 1977) (per curiam); *In re Weaver*, 610 F.2d 335 (5th Cir. 1980).

[7, 8] Whether the nonreviewability bar of § 1478(b) extends to an indirect review of a bankruptcy court's remand order is a question left open by the legislative history and existing jurisprudence interpreting § 1478(b). We resort to the jurisprudence interpreting § 1447(d) and its statutory predecessor[24] to receive some guidance. The United States Supreme Court has held that an order of a district court remanding a cause to the state court from which it was removed is not reviewable by the Supreme Court on appeal from a final judgment in the highest court of the state. *Metropolitan Casualty Insurance Co. v. Stevens*, 312 U.S. 563, 61 S. Ct. 715, 85 L.Ed. 1044 (1941); *McLaughlin Bros. v. Hallowell*, 228 U.S. 278, 33 S. Ct. 465, 57 L.Ed. 835 (1913); *Missouri Pacific Ry. v. Fitzgerald*, 160 U.S. 556, 16 S. Ct. 389, 40 L.Ed. 536 (1896).[25] Likewise, federal courts of appeals are precluded from reviewing in an ancillary proceeding the remand orders of a district court even after

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24. Former § 71 of the Judicial Code, 28 U.S.C. § 71 (1940), also prohibited review of a district court's remand order. It provided:

> [W]henever any cause shall be removed from any state court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the state court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed.

25. "Even on review in the Supreme Court of a state court proceeding following remand, the propriety of the remand, in a non-civil rights case, cannot be questioned." 14 C. Wright, A. Miller & E. Cooper, *supra*, § 3740, at 767-68.

judgment has been entered in state court. *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Haydu,* 637 F.2d 391 (5th Cir. 1981), *appeal after remand,* 675 F.2d 1169 (5th Cir. 1982) (party cannot attack remand order collaterly by bringing subsequent independent action involving same parties and claims as in original action); *Chicago, St. Paul, Minneapolis & Omaha Ry. v. Hensley,* 25 F.2d 861 (8th Cir. 1928) (interpreting 28 U.S.C. § 71); *cf. Atchison, Topeka & Santa Fe Ry. v. Smith,* 47 F.2d 223 (9th Cir. 1931) (§ 71 prohibits ancillary suit to enjoin state court proceeding after remand). We hold that § 1478(b), which contains language paralleling that of § 1447(d), bars our review, however indirect, of a bankruptcy court's order of remand. Hence, we are not empowered to review the Bankruptcy Court's January 18, 1980 remand order.

[9, 10] It is axiomatic that remanding a case to state court terminates the jurisdiction of a federal bankruptcy or district court over that case. *United States v. Rice,* 327 U.S. 742, 66 S. Ct. 835, 90 L.Ed. 982 (1946) (applying 28 U.S.C. § 71); *Robertson v. Ball,* 534 F.2d 63, 66 n. 5 (5th Cir. 1976) ("[O]nce the federal district court considers the proper factors and decides to remand, the action should go forward in state court without the further delay of appeal, and without regard to whether the federal district court was correct or incorrect."); 14 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure: Jurisdiction § 3739 (1976 & Supp. 1983); *cf. E.D. Systems Corp. v. Southwestern Bell Telephone Co.,* 674 F.2d 453 (5th Cir. 1982) (federal court lost jurisdiction as to claims it remanded to state court, but retained jurisdiction over proceedings excepted from the remand order). Even a federal court, persuaded that it

has issued an erroneous remand order, cannot vacate the order once entered. *In re La Providencia Development Corp.*, 406 F.2d 251 (1st Cir. 1969).[26] The federal court is completely divested of jurisdiction once it mails a certified copy of the order to the clerk of the state court.[27] *See* 28 U.S.C. § 1447(c); 1A J. Moore & B. Ringle, Moore's Federal Practice ¶ 0.169[2.-1], at 697 (2d ed. 1983); 14 C. Wright, A. Miller & E. Cooper, *supra*, § 3739, at 764-65; *see also Bucy v. Nevada Construction Co.*, 125 F.2d 213 (9th Cir. 1942) (district court could review and set aside its own erroneous remand order before filing of certified copy of order in state court because remand order is not self-executing); Bankruptcy Rule 9027(e).[28] "[O]nce a district court has decided to remand

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26. The First Circuit, although writing in the context of a diversity case, made the following germaine comments:

> Removal . . . , to the prejudice of state court jurisdiction, is a privilege to be strictly construed, . . . and the state court proceedings are to be interfered with once, at most. This is not only in the interest of judicial economy, but out of respect for the state court and in recognition of principles of comity. *The action must not ricochet back and forth depending upon the most recent determination of a federal court.*
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> . . . [T]here is no more reason for a district court being able to review its own decision, and revoke the remand, than for an appellate court requiring it to do so. Both are foreclosed; nothing could be more inclusive than the phrase "on appeal or otherwise." The district court has *one shot, right or wrong.*

In re La Providencia Development, supra, at 252-53 (emphasis added).

27. Section 1447(c) provides in pertinent part: "A certified copy of the order of remand shall be mailed by its clerk to the clerk of the State court. The State Court may thereupon proceed with the case."

28. Rule 9027(e) provides:

> (*e*) *Remand.* A motion for remand of the removed claim or cause of action may be filed only in the bankruptcy court and shall be served on the parties to the removed claim or cause of action. A motion to remand shall be determined as soon as prac-

a case and has so notified the state court, the district judge is without power to take any further action." *Federal Deposit Insurance Corp. v. Santiago Plaza,* 598 F.2d 634, 636 (1st Cir. 1979).

[11] Conditional remand orders seem to be contrary to the principles underlying the concept of remand. The notion that a federal court can impose a condition on a remand order, the occurrence of which would void judicial proceedings resumed by a state court after notice of a federal court's remand order and which would thereafter reinvest the federal court with jurisdiction over the case, runs counter to fundamental precepts of remand. *C.f Three J Farms, Inc. v. Alton Box Board Co.,* 609 F.2d 112, 115 (4th Cir. 1979), *cert. denied,* 445 U.S. 911, 100 S. Ct. 1090, 63 L.Ed.2d 327 (1980); *In re La Providencia Development, supra,* at 252; *see generally* 14 C. Wright, A. Miller & E. Cooper, *supra,* § 3749. We recog-

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ticable. A certified copy of an order of remand shall be mailed to the clerk of the court from which the claim or cause of action was removed.

Bankr. R. 9027(e), 11 U.S.C.A. (West Supp. 1983), *reprinted in* 1 app. Collier on Bankruptcy, *supra,* at 421. Former Interim Rule 7004(j) provided that a "certified copy of the remand shall be mailed by its clerk of the court from which the civil action or proceeding was removed *and that court may thereupon proceed with the case.*" Interim Bankr. R. 7004(j), 11 U.S.C. (1982), *reprinted in* 1 Collier on Bankruptcy, *supra,* ¶ 3.01, at 3-77 (emphasis added) (adopted as Local Bankr. R. 7004(j), effective January 1, 1979, by the United States Bankruptcy Court for the Northern District of Texas). Although the italicized language from Interim Rule 7004(j), which most directly illustrates the divesture of a remanding federal court's jurisdiction, was excised when Rule 9027 was adopted, the comments to Rule 9027 do not assign any significance to this excision. We doubt that the drafters of the rule intended to alter the time at which a remand typically becomes effective by so subtle a change.

"[T]he new Rules are applicable to proceedings pending on August 1, 1983, except to the extent that in the opinion of the court the application . . . would not be feasible or would work an injustice." 1 Bankr. Serv. (L.Ed.) § 2:30.1 (1984).

nize that conditional remand orders, while not common, are occasionally entered by bankruptcy courts. Nevertheless, we were cited to no cases or other writings, nor has our research discovered any, which would suggest that conditional remands are proper or improper.[29] The pro-

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29. Rule 11(f) of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation makes express provision for "Conditional Remand Orders." Manual for Complex Litigation § 5.22 (pt. 2), at 340 (5th ed. 1981) (supplement to C. Wright & A. Miller, Federal Practice and Procedure). The procedure established by Rule 11(f), however, clearly envisions that the remand order would not become effective until the passing of fifteen days from service of the proposed order on each party without any party noticing their opposition to it or, if a notice of opposition is filed, upon further order of the Judicial Panel on Multidistrict Litigation. Thus, the transferor court does not ever divest itself of jurisdiction in favor of the transferee court until the condition—fifteen days passage without notice of opposition or order of the judicial panel—is satisfied and the satisfaction of that condition is finally evidenced by filing the conditional remand order with the clerk of the transferee court. *See also In re A.H. Robins, Co., Inc., "Dalkon Shield" IUD Products Liability* Litigation, 453 F.Supp. 108, 109 n. 2 (J.P.M.L. 1978); *In re Penn Central Securities Litigation*, 349 F.Supp. 1029 (J.P.M.L. 1972).

Our research has turned up cases which have permitted partial remands, *see, e.g., In re Calabria*, 5 B.R. 73 (Bankr. D. Conn. 1980) (partial remand constitutes a severance and remand of separate and independent claims), second removal petitions, *see, e.g., O'Bryan v. Chandler*, 496 F.2d 403 (10th Cir.) (developments subsequent to and not concluded by prior remand order provide grounds for a second removal petition), *cert. denied*, 419 U.S. 986, 95 S. Ct. 245, 42 L.Ed. 2d 194 (1974); *Cliett v. Scott*, 233 F.2d 269 (5th Cir. 1956) (same), and conditional judgments, *see, e.g., Zintmaster v. Werner*, 41 F.2d 634 (3d Cir. 1930) (enforceability of judgment conditioned on party's perfecting title to property). Partial remands, second removal petitions, and conditional judgments do not involve the uncertainty over jurisdiction and the federal-state tensions that are presented by conditional remands in which occurrence of the condition abrogates the effectiveness of the remand.

Other federal courts have conditioned stays of federal proceedings pending determination of concurrent state actions for the purpose of preserving a party's procedural advantage in federal court even after the action is back in state court. *See, e.g., Mottolese v. Kaufman*, 176 F.2d 301 (2d Cir. 1949) (stay conditioned on defendants consenting to use in state court of depositions taken in accordance with

hibition against reviewing remand orders presumably explains the dearth of jurisprudence addressing the validity of conditional remands. The quandry presented by the

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federal rules); *Finley v. Doyle,* 178 F.Supp. 863 (S.D. N.Y. 1959) (stay conditioned on defendants submitting to depositions in accordance with federal rules); *Boggess v. Columbian Rope Co.,* 167 F. Supp. 854 (S.D. N.Y. 1958) (stay conditioned on defendant's consent to use in state court of interrogatories or depositions gathered in federal discovery proceedings); *Finkelstein v. Boylan,* 33 F.Supp. 657 (S.D. N.Y. 1940) (stay conditioned on defendants allowing completion and inspection of depositions begun under federal procedure before trial in stsate court). Conditional stays do not pose the same difficulties as are posed by conditions on remand that, if given effect, would void state proceedings altogether.

The district court cited cases for the different but analogous proposition that "the Bankruptcy Court did not exceed its authority in conditioning the modification of the automatic stay upon each party's compliance with the stipulation and agreement." 37 B.R. at 209. *See In re Dublin Properties,* 27 B.R. 506-07 (Bankr. E.D. Pa. 1983) (modification of automatic stay contingent upon parties' execution of a mortgage note; stay was *not* modified because the mortgage note was never executed); *In re Cosby,* 22 B.R. 682 (Bankr. E.D. Pa. 1982) (modification of automatic stay can be conditioned on payment at attorney's fees and other costs); *In re Ideal Roofing & Sheet Metal Works, Inc.,* 9 B.R. 2, 3 (Bankr. S.D. Fla. 1980) (parties stipulate to modification of stay to allow case to proceed to judgment; no condition); *In re El Patio, Ltd.,* 6 B.R. 518 (Bankr. C.D. Cal. 1980) (relief from automatic stay can be conditioned on debtor's turning over rents collected by debtor as provided in absolute-assignment-of-rents clause of trust deed). The three conditions in these cases represent conditions precedent to the modification of the stay. Similarly, a condition precedent to the effectiveness of a remand would not pose the same kind of problems for conflict between the federal and state judicial systems as to jurisdiction over a case as is posed by a condition that vitiates an executed remand order.

The analogy between automatic stay cases and cases involving remands is imperfect, at best, because a condition imposed on a modification of a stay does not pose the jurisdictional problem. Theoretically a court could condition its modification of a stay on a subsequent event the occurrence of which would result in a reimposition of the stay. Jurisdiction over the case would remain with the state court but any proceedings *subsequent* to the reimposition of the stay would be void. *Cf. Borg Warner Acceptance Corp. v. Hall,* 685 F.2d 1306, 1308 (11th Cir. 1982). Proceedings prior to the

reviewability bar, however, is that conditional remands continue to exist in the face of the principles governing remand orders and the applicable rules and even though they result in tension between the state and federal judicial systems and uncertainty as to whether a state or federal court has jurisdiction to act in a case. The remand order at issue in this case suffers from all of these defects and from the further defect that a federal bankruptcy court, in approving and effectuating the stipulation and agreement, may be viewed as having approved the parties' view that a state district judge is somehow unacceptable to try the case—all these defects being unreviewable.

B. Construction.

[12, 13] We are left, then, to determine whether there was compliance with the terms of the Bankruptcy Court's January 18, 1980 remand order. The stipulation and agreement, like a consent decree, being in the nature of a contract to which the court has given its formal approval, is subject to the rules of construction of contracts. *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-38, 95 S. Ct. 926, 929-30, 43 L.Ed.2d 148 (1975) ("[S]ince consent decrees and orders have many of the attributes of ordinary contracts, they should be construed basically as contracts. . . ."); *Robinson v. Vollert*, 602 F.2d 87, 92 (5th Cir. 1979) ("Consent orders are interpreted as contracts and are to be construed

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reimposition of the stay would not be void. In contrast, as the district court views it, giving effect to a condition subsequent on a remand order would apparently void proceedings that took place after the remand was executed and up to the time the condition subsequent occurs. *Cf. Browning v. Navarro, supra*, at 210. The vesting of jurisdiction should not be tied to so slender a thread as a conditional remand.

only by reference to the 'four corners' of the order itself."), *reh'g denied,* 609 F.2d 1177 (5th Cir. 1980); *see also In re New Mexico Properties, Inc.,* 18 B.R. 936, 941-42 (Bankr.D. N.M. 1982) ("stipulation is binding on the parties entering into it" and subject to rules for construing contracts). Where the issue is solely a question of interpreting contractual language, it is a question of law. *Seal Offshore, Inc. v. American Standard ,Inc.,* 736 F.2d 1078, 1080 (5th Cir. 1984).

The district court noted that the case was to be remanded "pursuant to the terms set out in the annexed stipulation and agreement. . . ." The district court pinpointed the following provisions of the stipulation and agreement as dispositive in determining whether the parties complied with the remand order:[30]

> —The "remand is conditional upon and shall *take effect* upon the *final assignment* of" the 1979 case to a visiting or retired state judge; and
>
> —"In the event that the BROWNING INTERESTS and Debtors [Humble and Holloway] are unable to obtain the *assignment* of [the 1979 case to a visiting or retired state judge], the remand . . . shall not *take effect* and the Bankruptcy Court shall retain jurisdiction over said cause which shall proceed to trial in the Bankruptcy Court before a jury."

(Emphasis added.) The district court, not unreasonably, interpreted the words "final assignment" to mean that the ultimate disposition of the issues extant in the 1979 case should be made before a retired or visiting state judge.

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30. 37 B.R. at 210.

[14] The polestar for courts in interpreting contracts is to ascertain the intent of the parties.[31] 4 Williston on Contracts § 600 (3d ed. 1961 & Supp. 1984); 3 Corbin on Contracts § 542 (1951). Determining the parties' intent in using the phrase "final assignment" is pivotal in interpreting the stipulation and agreement. The district court's interpretation that "final assignment" meant ultimate disposition before a retired or visiting state judge is not evident from examining the ordinary meaning of the words. The parties could have intended that the assignment by the presiding judge be "final" in terms of the last step before trial of the 1979 case. When the 1979 case was remanded, it was returned to the docket of an active state judge who then requested the presiding judge to reassign or perhaps "finally" assign the 1979 case to a retired state judge. This interpretations is supported by reading the stipulation and agreement as a whole, because the parties further provided that "[f]ull rights of appeal are preserved to all parties."[32] Presumably, on appeal, the state district court judgment could have been reversed and the cause remanded as occurred here. The parties did not specify that the case should have been assigned to a retired or visiting state judge a second time if remanded by the state court of appeals.

We should endeavor to render an "interpretation which gives a reasonable, lawful and effective meaning" to the

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31. The rules of interpretation of contracts are set out in varying degrees, and sometimes form, in Restatement of Contracts §§ 230, 233, 235 (1932); Restatement (Second) of Contracts §§ 202-203, 207 (1979); 4 Williston on Contracts §§ 618-626 (3d ed. 1961 & Supp. 1984); 3 Corbin on Contracts §§ 545-550 (1951), and J. Calamari & J. Perillo, Contracts § 3-11 (1977).

32. Record Vol. C, Exhibit 7 (stipulation and agreement), para 4.

stipulation and agreement while giving "great weight" to the "principal apparent purpose of the parties." Restatement of Contracts, *supra,* § 236. We are mindful that the stipulation and agreement is in the nature of a consent decree and pay heed to Justice Marshall's pertinent observations:

> Consent decrees are entered into by parties to a case after careful negotiation has produced agreement on their precise terms. The parties waive their right to litigate the issues involved in the case and thus save themselves the time, expense, and inevitable risk of litigation. Naturally, the agreement reached normally embodies a compromise; in exchange for the saving of cost and elimination of risk, the parties each give up something they might have won had they proceeded with the litigation. Thus the *decree* itself cannot be said to have a purpose; rather the *parties* have purposes, generally opposed to each other, and the resultant decree embodies as much of those opposing purposes as the respective parties have the bargaining power and skill to achieve. For these reasons, the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it.

United States v. Armour & Co., 402 U.S. 673, 681-82, 91 S. Ct. 1752, 1757, 29 L.Ed.2d 256 (1971). Thus, although it may be inferred (and we have assumed) that the principal apparent purpose of at least one of the parties was to avoid having an active state judge try the 1979 case, whether by oversight or purposeful omission following negotiation, the parties to the stipulation and agreement did not provide for what occurred after the initial assignment of the 1979 case—a judgment, appeal,

reversal and remand, and another proceeding in the state district court.

[15] Under the stipulation and agreement, the remand was to *"take effect"* upon the *"final assignment"* of a visiting or retired state judge to hear the case. In good faith, the presiding judge of the administrative judicial district upon request of the parties attempted to effectuate the Bankruptcy Court's remand order by *assigning* the case to a retired state judge not just once but twice. Following the initial assignment, there were proceedings, a verdict and judgment, and a reversal on appeal. There is no doubt that had these initial proceedings ended in a final judgment for either party, we would not have been called upon to decide the issues addressed herein. There is also no doubt that the parties pursued their cause in the state court system following remand confident that jurisdiction over the case had been restored to the state court.[33] In other words, the remand took effect no later than upon satisfaction of the condition—the final assignment of the 1979 case to the retired state judge. With the condition satisfied, the remand given effect, the Bankruptcy Court divested of jurisdiction, and the state court reinvested with jurisdiction, the subsequent assignment of the case to an active state district judge could not (under the principles applicable to remand orders discussed

33. Otherwise, the parties were indeed trifling with the state courts—a practice that we, like the state court of appeals, condemn. *Compare Lewis v. Brown & Root, Inc.*, 711 F.2d 1287, 1291 (5th Cir. 1983) (dismissal for want of prosecution upheld; "trifling with a busy court, burdened with a heavy docket of serious matters, need not be borne"), *with Humble Exploration Co. v. Browning*, 677 S.W. 2d 111 (Tex. App.—Dallas 1984, no writ) ("To allow both [state and federal appeal] would be to permit a party to trifle with the state court by allowing it to proceed to a judgment which he may accept or reject at will.").

above) operate to divest the state court of jurisdiction, even had the parties intended to do so.

As it is, we find no evidence that the parties intended to divest the state court of jurisdiction once it had attached. While we recognize that perhaps the principal intent of at least one of the parties was to keep the 1979 case out of the hands of an active state judge, the language of the stipulation and agreement suggests that the parties may have recognized that there were limits on their ability to realize that objective once jurisdiction had vested in the state courts. The stipulation and agreement never speaks in terms of the Bankruptcy Court reassuming jurisdiction over the case once the state court had been vested with jurisdiction following issuance of the remand order.[34] And we will not presume that the parties intended to do something that was impossible to accomplish. The suggestion that the subsequent trial of the 1979 case before an active state judge is void after two-and-a-half years of effort by the parties and the state courts is a waste of judicial resources never anticipated by the court in issuing its January 18, 1980 remand order or the parties in confecting the annexed stipulation and agreement. We refuse to countenance such a waste

34. The Trustee and Holloway do not contend that the parties ever contemplated a "reverter remand" whereby jurisdiction would revert back to the Bankruptcy Court if the 1979 case was *ever* assigned to an active state judge. Instead, they contend that, when Judge Walker assumed jurisdiction over the case, the condition subsequent was implicated, the remand rendered a nullity, the interim state court proceedings presumably voided, and the Bankruptcy Court again invested with jurisdiction over the case. In other words, the Trustee's position is that the Bankruptcy Court *never* lost a jurisdiction that was to be retained by it if the condition specified in the stipulation and agreement occurred. The concepts of remand and comity would never be the same if we cloaked the Trustee's contentions with the mantle of legitimacy.

now by giving effect to a construction of the stipulation and agreement that confounds the general principles of remand and places at odds the federal and state judicial systems.[35]

[16] The Trustee contends that the remand order included an automatic revocation provision within its own terms. A bankruptcy court should not be permitted to devise a remand order providing for *revocation* upon the occurrence of a condition since the court could not itself directly review and revoke the order subsequent to the occurrence of the condition. If we held that a remand could be revoked by its issuing court via an automatic revocation provision which the court itself concocted, we would be authorizing a bankruptcy court to do indirectly that which it is prohibited from doing directly. *See In re La Providencia Development, supra,* at 252. The Trustee also contends that the concept of dual jurisdiction can explain a simultaneous jurisdiction of the state court and the Bankruptcy Court over the case. No authority—case law or commentary—was cited by the Trustee to support such a concept and we do not give it credence here. Professor Wright succinctly summarizes the widely accepted notion that "[a]n order of remand ends the jurisdiction of the federal court." C. Wright, Law of Federal Courts § 41, at 237 (4th ed. 1983). There is no room for dual jurisdiction in this thinking.

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35. We are reminded of Justice Brook's admonition:

> The party ought to direct his meaning according to the law, and not the law according to his meaning, for if a man should bend the law to the intent of the party rather than the intent of the party to the law, this would be the way to introduce barbarousness and ignorance and to destroy all learning and diligence.

Throckmerton v. Tracy, 75 Eng. Rep. 222, 251 (K.B. 1554).

V. The Automatic Stay.

We are not constrained in our review of the Bankruptcy Court's purported modification of the automatic stay by a statutory provision comparable to 28 U.S.C. § 1478(b) barring such review. Thus, we must assess whether the Bankruptcy Court achieved through a modification of the stay what we have held it did not achieve via its remand order.

[17] The automatic stay under 11 U.S.C. § 362(a) accompanies the filing of a petition in bankruptcy and operates to prevent the commencement or continuation of any judicial, administrative, or other proceeding against the debtor "that was or could have been commenced before the commencement of the [bankruptcy] case. . . ." 11 U.S.C. § 362(a); 2 Collier on Bankruptcy, *supra*, ¶¶ 362.03-362.04[1]. The automatic stay is intended to give "the debtor a breathing spell from his creditors." S. Rep. No. 989, 95th Cong., 2d Sess. 54-55, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5787, 5840-41; H.R. Rep. No. 595, 95th Cong., 1st Sess. 340, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6297; *see also Wedgeworth v. Fibreboard Corp.*, 706 F.2d 541, 544 (5th Cir. 1983). Generally, a stay continues, in the case of an act against property of the estate, until the property is no longer property of the estate or, in the case of other acts under § 362(a), until the earliest of the closing of the case, the dismissal of the case, or the time a discharge is granted or denied. 11 U.S.C. § 362(c); *see* 2 Collier on Bankruptcy, *supra*, ¶ 362.06, at 362-43.

[18] A party in interest who desires to pursue his pending but stayed action may file a complaint or motion in the bankruptcy court for relief from the automatic

stay to proceed with his cause, *see* 11 U.S.C. § 362(d), or either party to the pending action may file a motion for removal pursuant to 28 U.S.C. § 1478. *See In re Critical Fork Coal Corp.*, 18 B.R. 422, 424 (Bankr. W.D. Va. 1982) (§ 362(d) motion for relief from automatic stay and § 1478(b) remand are alternative methods of seeking relief from automatic stay). Section 362(d) provides that, "[o]n request of a party in interest and after notice and a hearing, the court shall grant relief from the [automatic] stay . . . by terminating, annulling, modifying, or conditioning such stay . . . for cause. . . ."[36]

[19, 20] Section 362(d) expressly authorizes a bankruptcy court to modify or condition the automatic stay to provide relief to a party in interest who has requested it.[37] Thus, if a modification of the automatic stay was

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36. The House Report states:

> [Section 1478(d)] requires the court, on request of a party in interest, to grant relief from the stay such as by terminating annulling, *modifying, or conditioning the stay, for cause.* The lack of adequate protection of an interest in property of the party requesting relief from the stay is one cause for relief, but is not the only cause. As noted above, *a desire to permit an action to proceed to completion in another tribunal may provide another cause.* Other causes might include the lack of any connection with or interference with the pending bankruptcy case.

H.R. Rep. No. 595, 95th Cong., 1st Sess. 343, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6300 (emphasis added).

37. The Trustee contends that the Brownings never made a request for relief from the stay so the Bankruptcy Court could not have acted to lift the stay under § 362(d). The Brownings argue that such a hypertechnical reading of their attempts to proceed in state court would amount to lifting form over substance and require parties to label any attempt to so proceed as a "Motion to Gain Relief from the Automatic Stay." *See* 2 Collier on Bankruptcy, *supra*, ¶ 362.08, at 362-52. Although we are sympathetic with the Brownings' position on this issue, we find it unnecessary to resolve the issue because, whether the stay is characterized as a continuation of the automatic stay or as a newly issued stay, the same result inures.

what was attempted by the Bankruptcy Court, the district court was correct in holding "that the Bankruptcy Court did not exceed its authority in conditioning the modification of the automatic stay upon each party's *compliance* with the stipulation and agreement." 37 B.R. at 209 (emphasis added) (citing *In re Dublin Properties*, 27 B.R. 506, 506-07 (Bankr. E.D. Pa. 1983); *In re Cosby*, 22 B.R. 682 (Bankr. E.D. Pa. 1982); *In re Ideal Roofing & Sheet Metal Works, Inc.*, 9 B.R. 2, 3 (Bankr. S.D. Fla. 1980); *In re El Patio, Ltd*, 6 B.R. 518 (Bankr. C.D. Cal. 1980)). In the alternative, if removal and remand terminated the automatic stay, the Bankruptcy Court's order calling for a modification of what is supposed was a continuing automatic stay amounted to the issuance of a new stay under 11 U.S.C. § 105(a). *In re Martin Exploration Co.*, 731 F.2d 1210 (5th Cir. 1984). A bankruptcy court has the power to enjoin proceedings excepted from a § 362 stay under 11 U.S.C. § 105(e) and 28 U.S.C. § 1481. H.R. Rep. No. 595, 95th Cong., 1st Sess. 342, *reprinted in* 1978 U.S. Code Cong. & Ad. News 5963, 6298, *cited in* 1 Collier on Bankruptcy, *supra*, ¶ 3.01[2][e], at 3-73 n. 102. *Cf. In re Stuart Motel, Inc.*, 15 B.R. 28 (Bankr. S.D. Fla. 1981) (once lifted, stay cannot be reimposed by bankruptcy court under § 362). Moreover, a bankruptcy court is invested with such broad equitable powers under § 105 that it may condition the issuance of a new stay upon each party's *compliance* with the stipulation and agreement. *See, e.g., In re Voegel Ice Cream Co.*, 7 B.R. 430 (Bankr. D. Minn.) 1980) (pursuant to stipulation agreement, bankruptcy court could *lift* stay and refuse to retain jurisdiction under § 105 upon debtor's default of obligations under agreement).

The contentions of the parties[38] notwithstanding, we find it unnecessary to determine the precise moment when the automatic stay terminates, if it does at all, upon the removal of a cause from a state court to a bankruptcy court and upon its subsequent remand. Whether the Bankruptcy Court's January 18, 1980 order is viewed as a modification of the automatic stay, as the district court itself suggested, or as the issuance of a new stay, it is a construction of the *terms* of that stay which is dispositive of the issue whether the stay was violated. Hence, as in our discussion of the remand order, we turn to a construction of the stipulation and agreement, which was annexed to the order modifying the stay, to determine whether the parties complied with its terms.

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38. The Brownings contend that the automatic stay is lifted upon removal of a case to the bankruptcy court and that the court does not have authority to reimpose the automatic stay once it has been lifted. *In re Stuart Motel, Inc.*, 15 B.R. 28 (Bankr. S.D. Fla. 1981). The Trustee contends that the automatic stay does not apply to "adversary proceedings" in the bankruptcy court and does not automatically terminate upon removal or remand. *In re Greco*, 3 B.R. 18 (Bankr. D. Hawaii 1979) (bankruptcy court expressly continues automatic stay as to husband-debtor, but not his wife, in remanding action to state court). A bankruptcy judge could remand a case but delay termination of the automatic stay, the Trustee argues, to provide the debtor with an additional "breathing spell" prior to litigating the remanded action. The Brownings suggest that the bankruptcy judge might more sensibly accomplish this purpose by imposing a stay under 11 U.S.C. § 105. Otherwise, state courts would be prohibited from taking action in a case remanded from a bankruptcy court unless the bankruptcy court expressly lifted the automatic stay in addition to remanding the case. The Brownings argue that this cumbersome procedure is an unreasonable construction of Congress' intent in enacting § 362. We note, however, that the advisory committee note to Rule 9027 states: "If the claim or cause of action which is removed to the bankruptcy court is subject to the automatic stay of § 362 of the Code, the litigation may not proceed in the bankruptcy court until relief from the stay is granted." This note militates in favor of the Brownings' position.

The operative language in the January 18, 1980 order deals with which court is to have "jurisdiction" to try the 1979 case. The order states that the "automatic stay provisions of section 362 of the Bankruptcy Code are modified so as to permit the remand of [the 1979 case] and the trial of same pursuant to the terms of the annexed Stipulation and Agreement as amended." Paragraphs 1, 2, and 3 of the stipulation and agreement speak to the jurisdictional component, delineating the condition for retention or transfer of the case. Clearly, the parties intended that the automatic stay would be lifted to permit a trial of the 1979 case if the remand became effective. That the modification of the stay could operate independently of the remand so as to permit the remand to be given effect and yet, upon occurrence of the condition, there results a reimposition of the automatic stay or an issuance of a new stay is a construction of the stipulation and agreement that is not feasible upon a careful reading of the document as a whole. Nor has the Trustee or Holloway proffered such a construction. Thus, we hold that the parties to the stipulation and agreement intended that the stay be modified to permit trial of the 1979 case when the remand became effective and that the instrument can not be interpreted to have stayed the state court proceedings at some point following effectuation of the Bankruptcy Court's remand.

The stipulation and agreement does not contain any provisions pertinent to the stay modification that were not implicated by our construction of the remand order. As we previously determined, the condition expressly appended to the remand order and impliedly appended to the stay was satisfied upon the "final assignment" of the cause by the presiding judge of the administrative judicial

district to a retired state judge. This assignment resulted from the parties' joint application seeking such an assignment and was the fruition of the parties' compliance with the stipulation and agreement. Because each party complied with the terms of the stipulation and agreement and such compliance was the only precondition to a lifting of the stay—whether the stay is characterized as a continuation of the automatic stay or a newly issued stay—we hold that the stay of the proceedings concerning the 1979 case was terminated and those proceedings were not void.

VI. Other Matters.

Although the parties have raised a multitude of fascinating issues pertaining to the remand order and the modification of the stay, the answers to which would have far-reaching implications for the administration of our bankruptcy laws, our disposition of this case precludes us from exploring these issues. Because we determined that assignment of the 1979 case to a retired state judge in the first instance constituted a compliance with the terms of the stipulation and agreement so as to give effect to the modification of the stay and the remand, we refrain from deciding: whether the parties' consent to the remand order precludes a later attack upon an enforcement of its terms; whether the automatic stay terminates upon a case's removal to bankruptcy court, its subsequent remand to state court, or thirty days after a party requests a remand to state court; whether the district court's injunction against enforcement of the state court judgment satisfied the requirements of Rules 65(d) of the Federal Rules of Civil Procedure; whether the district court 1982 abstention order represented an abrogation of its jurisdiction over the 1979 case which acted to preclude the bankruptcy

court's assumption of jurisdiction over the instant case; whether the incorporation of the stipulation and agreement into Humble's reorganization plan precluded a subsequent assessment of the validity of the conditional remand order.

VII. Conclusion.

We hold that the Bankruptcy Court was divested of jurisdiction upon the parties' compliance with the terms of the January 18, 1980 remand order and the annexed stipulation and agreement. We further hold that the assignment of a retired judge to try the case in the first instance constituted a "final assignment" of the case pursuant to the terms of the stipulation and agreement and satisfied the precondition to the lifting of the Bankruptcy Court's stay of the state court proceedings in the 1979 case such that the subsequent state court proceedings were not void. In view of the fact that this dispute has been festering in the courts for nearly five years, it is time for this litigation to be concluded as promptly as possible. Toward that end and for the reasons enunciated above, the case is reversed and remanded to the district court for proceedings not inconsistent with this opinion.

REVERSED and REMANDED.

APPENDIX D

NOTICE OF DECISION

COURT OF APPEALS
Fifth Supreme Judicial District

Jeannette Johnson, Clerk

Dallas, Texas, October 4, 1984

J. Bruce Bennett
R. Jack Ayres
Joseph W. Geary
Phillip Palmer
Tim Vineyard
G. H. Kelso,
....., Texas

Sir:

You are hereby notified that, in the case of Humble Exploration Company, et al. v. Jane H. Browning, et al. our No. 05-82-01378-CV, from Dallas County, the following decision and order was this day made and entered by this Court:

In this cause came on to be heard appellants' motion to withdraw judgment granting appellees' motion to dismiss the appeal, and the same being inspected, it is therefore considered, adjudged and ordered that the judgment of this Court dated July 11, 1984, be at this time vacated. Counsel for all parties are invited to submit further written argument.

Respectfully yours,

Jeannette Johnson, Clerk
Court of Appeals, Fifth Supreme
Judicial District of Texas

APPENDIX E

HUMBLE EXPLORATION COMPANY,
et al., Appellants,

v.

Jane H. BROWNING, et al., Appellees.

No. 05-82-01378-CV.

Court of Appeals of Texas,
Dallas.

March 26, 1985.

Rehearing Denied April 25, 1985.

Appeal was taken from judgment of the 162nd District Court, Dallas County, Dee Brown Walker, J. The Court of Appeals dismissed appeal and denied rehearing, 677 S.W.2d 111, and later entered ex parte order granting motion for rehearing after judgment became final. On motion to strike that motion for rehearing, the Court of Appeals, Claude William, C.J., Retired, held that: (1) Court of Appeals has plenary power over its judgments after motion for rehearing is overruled until expiration of its term, but (2) entry of ex parte order granting untimely motion for rehearing was error in this case.

Order dismissing appeal reinstated.

Guittard, C.J., dissented and filed opinion in which Carver, Vance, Maloney, Devany and Howell, JJ., joined.

Joe H. Reynolds, Kay T. Pierce, T. Lamar McCorkle, Jr., J. Bruce Bennett, Reynolds, Allen & Cook, Dallas for appellants.

R. Jack Ayres, Jr., Kenneth F. Nye, Thomas V. Murto III, Larry B. Dwight, G. H. Kelsoe, Kelsoe & Kelsoe, Joseph W. Geary, Geary, Stahl & Spencer, Dallas, for appellees.

Before the court en banc.[1]

CLAUDE WILLIAMS, Retired Chief Justice.

ON MOTION OF APPELLEES TO STRIKE APPELLANT'S MOTION TO WITHDRAW JUDGMENT DISMISSING APPEAL AND APPELLEE'S MOTION TO SET ASIDE THE COURT'S ORDER OF OCTOBER 4, 1984.

Resolution of the questions presented by these motions requires an answer to two questions: (1) does the court of appeals have plenary power over its judgments within the term after a motion for rehearing is overruled and (2) if such a plenary power existed was it properly applied in the instant case. In answer to the first question we hold that the Court of Appeals does possess plenary power over its judgments within the term after the motion for rehearing is overruled. In answer to the second question we hold that the court of appeals improperly applied

1. Our original opinion in this cause, *Humble Exploration Co. v. Browning*, 677 S.W.2d 111 (Tex. App.—Dallas 1984, no writ), was issued by a special panel composed of Chief Justice Guittard; Chief Justice Williams (Retired), Fifth Court of Appeals; and Justice Keith (Retired), Ninth Court of Appeals. Chief Justice Williams and Justice Keith were assigned to this panel pursuant to TEX. REV. CIV. STAT. ANN. art. 1812 (Vernon Supp. 1984). This opinion is issued by the court en banc with Chief Justice Williams and Justice Keith participating.

its plenary power in the instant case and therefore the judgment of this court rendered on July 11, 1984 should be reinstated.

A comprehensive resume of the background of this case is essential. After the appeal of this case had been perfected to this court numerous motions were filed. Appellees filed their motion to dismiss the appeal and appellants filed their motion to abate the appeal pending the outcome of the proceedings in the case in the United States District Court and United States Court of Appeals. This court unanimously overruled and denied the plea in abatement. Thereafter, on February 9, 1984, appellees' motion to dismiss the appeal was argued before the court. After having the matter under consideration for several months and being fully advised of all the facts, circumstances, and law revealed by the record and briefs, this court, on July 11, 1984, unanimously delivered a comprehensive opinion by Justice Keith in which appellees' motion to dismiss the appeal was granted. *Humble Exploration Co. v. Browning,* 677 S.W.2d 111 (Tex. App. —Dallas 1984, no writ).

Appellants filed their motion for rehearing in due time and on September 7, 1984 this court unanimously overruled such motion.

Thereafter, on October 3, 1984, twenty-six days later and without any effort to comply with Rule 21c Texas Rules of Civil Procedure, which specifically mandates that a motion be filed and approved in order to file a second motion for rehearing, appellants filed a "motion to withdraw judgment granting appellees motion to dismiss appeal." A careful examination of this motion reveals that same was obviously wrongfully and purposely

denominated and constituted nothing more than a second motion for rehearing which could not be legally filed in this court after 15 days of the order of this court on September 7, 1984, as specifically mandated by Rule 21c.

Although faced with the undeniable fact that the judgment and opinion of this court became final after the fifteenth day after the unanimous order overruling the only legally filed motion for rehearing on September 7, 1984, a majority of the court, on October 4, 1984, over the vigorous and emphatic dissent of Chief Justice Williams, and without notice to the parties, caused the entry of an *ex parte order* sustaining appellants' motion to withdraw judgment dismissing the appeal and thereby vacating the court's judgment of July 11, 1984, and allowing the filing of motions and briefs.

Now, various motions and briefs having been submitted it becomes necessary to decide the questions set forth above.

PLENARY POWER OF APPELLATE COURT

[1] The question here presented concerns the effect of the term of the appellate court which, as prescribed by statute, "shall begin and end with the calendar year." TEX. REV. CIV. STAT. ANN. art. 1816 (Vernon Supp. 1984). According to common law, every court of general jurisdiction has inherent power to set aside or modify its judgments within the term at which they were rendered. This rule was firmly recognized with respect to trial courts. *Townes v. Lattimore,* 114 Tex. 511, 272 S.W. 435, 436 (1925); *See, Eichelberger v. Eichelberger,* 582 S.W.2d 395, 398 (Tex. 1979). It was equally well recognized with respect to the courts of civil appeals. *Hennings-*

meyer v. First State Bank, 109 Tex. 116, 195 S.W. 1137, 1138 (1917); *McGhee v. Romatka,* 92 Tex. 241, 47 S.W. 520 (1898).

[2] The period within which a trial court may exercise this inherent power was modified by the special practice act and later by the Texas Rules of Civil Procedure. The original act provided that the judgment of a district court should become "final" on expiration of thirty days after rendition of the judgment or the overruling of a motion for new trial "as if the term of court had expired." TEX. LAWS 1923 p. 215. This provision was construed as continuing the court's jurisdiction until thirty days after the motion for new trial was acted on, even though no action was taken within the term. *Nevitt v. Wilson,* 116 Tex. 29, 285 S.W. 1079 (1926). This construction, according to the supreme court, was in line with the rule that statutes governing new trials will not be construed as attempting to abridge the courts inherent power to grant new trials so long as it has judisdiction of the case. *See Nevitt,* 285 S.W. at 1083.

[3] Since the original act, according to *Nevitt,* set no limit on the period of the trial court's power over its judgments when a motion for new trial was filed, the Act was amended to provide that a motion for new trial is overruled by operation of law if not acted on within forty-five days after it is filed. TEX. LAWS 1930, p. 227. Under this amendment, the court's plenary jurisdiction ends, not when the motion for new trial is overruled, but thirty days later, as if the term of the court had been expired. *Dallas Storage & Warehouse v. Taylor,* 124 Tex. 315, 77 S.W. 2d 1031, 1034 (1934). In *Dallas Storage* the supreme court construed the provisions of the Act prescribing the times for filing and amending a motion for new trial as

mandatory, but held that this construction "does not trench upon the inherent power of the court to exercise control over its judgments during the time in which it is rendered, so long as it has jurisdiction of the cause." In *Dallas Storage* the court construed the statute to mean that the district court term ends with respect to any particular case thirty days after the judgment, if no timely motion for new trial is filed, or thirty days after a timely motion is overruled, either by order or by operation of law. Consequently, although an untimely motion for new trial has no effect, the court may still grant a new trial so long as its jurisdiction continues, that is, until the end of the term as defined by the statute with respect to the particular case.

These provisions of the Special Practice Act were carried forward in the Texas Rules of Civil Procedure. Rule 329b, Texas Rules of Civil Procedure, as recently amended, no longer provides that the judgment shall be "final" and makes no provision concerning the end of the term. Instead, it defines the court's "plenary power to grant a new trial or vacate, modify, correct or reform the judgment," with substantially the same effect. TEX. R. CIV. P. 329b(d)-(f). Thus, subdivision (e) provides that the "plenary power" continues "until thirty days after such timely filed motions are overruled."

[4] No similar statute or rule has been adopted with respect to the terms of the appellate courts or their powers over judgments. Consequently, this power continues until the end of the calendar year, when the term ends, as provided by article 1816, unless the exclusive jurisdiction of the supreme court has attached by the filing of an application for writ of error. The continuation of this power after the motion for rehearing is overruled is recognized by rule

446 of the Texas Rules of Civil Procedure, which provides:

> If a Court of Appeals vacates, modifies, corrects, or reforms its judgment after the mandate has been issued, the mandate shall have no further effect and a new mandate may be issued.

Of course, no mandate can properly be issued until the motion for rehearing has been overruled or the time for filing such a motion has expired. TEX. R. CIV. P. 442.

The significance of the end of the term of the appellate court after adoption of the Rules of Civil Procedure was recognized by the supreme court in *Wilson Independent School District v. Weaver,* 143 Tex. 530, 187 S.W.2d 221, 222 (1945). The only question presented was whether the jurisdiction of the court of civil appeals continued into the succeeding term, and the supreme court held that it did because of the pendency of a motion to certify at the expiration of the term. From this opinion it is clear that nothing in the present rules changes the rule followed under the former statutes that the appellate court has jurisdiction until the expiration of the term.

[5] When the appeal is perfected, the court of appeals "acquires plenary jurisdiction over the entire controversy," but when an application for writ of error is filed, the exclusive jurisdiction of the supreme court attaches. *Ammex Warehouse Company v. Archer,* 381 S.W.2d 478, 482 (Tex. 1964). Thus, it is clear that the filing of an application for writ of error, as well as expiration of the term, teminates the jurisdiction of the intermediate court. *Johnson v. Sovereign Corporation,* 125 Tex. 329, 83 S.W. 2d 605, 608 (1935); *Coiffure Continental v. Allert,* 521

S.W.2d 665 (Tex. Civ. App.—Dallas 1975, no writ). Moreover, the intermediate court has no power to change its judgment after the supreme court has approved it by denying a writ of error. *Gammel Statesman Publishing Co. v. Ben C. Jones & Co.* 206 S.W. 931 (Tex. Comm'n App. 1918, *holding approved*). Therefore, we find no support for the view that between the overruling of the motions for rehearing and the filing for application for writ of error there is a hiatus during which no court has jurisdiction. Nevertheless, appellate judgments are not without finality. If no application for writ of error is filed, nothing is pending in the court of appeals, the court's jurisdiction terminates with the end of the term, *Kruegel v. Rawlins,* 182 S.W. 705 (Tex. Civ. App.—Dallas 1916, writ ref'd), in which this court held that it had no jurisdiction to set aside its judgment "after the adjournment of the term at which it was rendered."

THE PROPER EXERCISE OF PLENARY JURISDICTION

The record before us, both as to facts and as to the law, is clear. The opinion of this court dismissing the appeal was rendered on July 11, 1984, by unanimous court. Thereafter on September 7, 1984, this court unanimously overruled appellants motion for rehearing. Twenty six days later, on October 3, 1984, and without making any effort to file a petition for writ of error in the Supreme Court of Texas, the appellants filed in this court what they designated as a "motion to withdraw judgment granting appellees motion to dismiss appeal." Prior to the filing of such motion appellants made no effort to comply with the terms and conditions of rule 21c TEX. R. CIV. P. which specifically mandates that a motion be filed and approved

in order to file a second motion for rehearing. Appellants now redenominate that their "motion to withdraw" and say it was really a "motion to reinstate." Regardless of the style attached to the motion a review of same reveals that it is nothing more than a second motion for rehearing. Chief Justice Guittard, in *Plenary Motions in the Appellate Court,* State Bar of Texas, APPELLATE PROCEDURE IN TEXAS § 18 (2d ed. 1979), states:

> After an appeal is dismissed, an appellant may file a motion to reinstate on the ground that the dismissal was improper. Such a motion is, in effect, a motion for rehearing with respect to the dismissal.
>
> APPELLATE PROCEDURE IN TEXAS at 398-399.

[6] Chief Justice Guittard's analysis that a motion to reinstate an appeal, like a motion to vacate or a motion to withdraw the judgment dismissing the appeal, is in effect a motion for rehearing is supported by *Blaylock v. Slocomb,* 245 S.W. 648 (Tex. Comm. App. 1922, judgment adopted); *Kruegel v. Rawlins,* 182 S.W. 705 (Tex. Civ. App.—Dallas, 1916, writ ref'd); *Gammel Statesman Publishing Co. v. Ben C. Jones & Co.,* 206 S.W. 931 (Tex. Comm. App. 1918, *holding approved*) and *Wilson Finance Co. v. State,* 348 S.W.2d 639, 641 (Tex. Civ. App.—Austin 1961, no writ). Thus, it is apparent that appellants have failed to meet the mandatory time requirements of rule 458 Texas Rules of Civil Procedure. This rule specifically requires that any further motion for rehearing must be filed within fifteen days of the order complained of. In addition rule 458(b) provides in relevant part, that:

> when a further motion for rehearing is filed the regulations contained in section (a) of this rule and rule

> 460 and 468 shall apply to it as though it was a first motion for rehearing.

The mandatory time limitations imposed by rule 458 are made inflexible by the expressed provisions of rule 5 Texas Rules Civil Procedure which state in substance, that neither trial nor appellate courts may

> not enlarge the period for taking any action under the rules relating to new trials or motions for rehearing or the period for taking an appeal or writ of error from the trial court to any higher court or the period for application for writ of error in the Supreme Court, as except as stated in these rules.

It is thus quite apparent that when the supreme court adopted the Rules of Civil Procedure in 1941 it imposed a strict limitation upon the authority of the courts of appeals to consider and grant untimely motions for rehearing. It has consistently refused to permit enlargement for motions for rehearing. It is thus apparent that when a statute or rules specifically addresses a subject, such as mandatory time limits when considering a motion for rehearing, a court should not act contrary to or in circumvention of the statute or rule, otherwise the statute or rule would have no meaning because in a given case each court could by inherent power exempt itself from the rule whenever the alleged need arose. *Reynolds v. Dallas County,* 146 Tex. 372, 207 S.W.2d 362 (1948); *Winter v. Hamilton,* 214 S.W.2d 330 (Tex. Civ. App.—Eastland 1948, no writ); *Bell v. Reins Co.,* 326 S.W.2d 189 (Tex. Civ. App.—Texarkana 1959, no writ); *Saunders v. Martin,* 390 S.W.2d 513 (Tex. Civ. App.—Texarkana 1965, no writ); *West Texas Equipment Co. v. Walker,* 417 S.W.2d 864 (Tex. Civ. App.—Amarillo 1967, writ ref'd

n.r.e.); *Ector County Independent School District v. Hopkins,* 518 S.W.2d 576 (Tex. Civ. App.—El Paso 1974, no writ) (time for filing a motion for rehearing may not be extended by agreement of the parties or by action of the court).

Rule 21c, Texas Rules of Civil Procedure, provides in relevant part that:

* * * *

> (1) an extension of time may be granted for late filing in a court of appeals of a transcript statement of facts, *motion for rehearing,* or application of the supreme court for writ of error, if a motion reasonable explaining the need therefore is filed within fifteen days of the last date of filing as prescribed by the applicable rules or rule. (Emphasis supplied).

The leading commentators on the meaning of rule 21c when it was adopted were in agreement that a motion under rule 21c was a prerequisite to invoking the jurisdiction of the court to consider late filed documents governed by rule 21c. Pope and McConnico "Practising Law with the 1981 Texas Rules," 32 *Baylor Law Review* 457, 509 (1980). This court in *Wallace v. Texas Employers Insurance Association,* 624 S.W.2d 268 (Tex. Civ. App. —Dallas 1981, no writ); and the Austin Court of Appeals in *Exposition of Apartments Co. v. Barba,* 624 S.W.2d 414 (Tex. Civ. App.—Austin 1981, no writ) held that the purpose in effect of rule 21c was to eliminate the jurisdictional effect of filing deadlines and return to them the discretion they possessed prior to the adoption of the rules of civil procedure and, accordingly, held that there was no mandatory requirement that a formal motion under rule 21c be filed within fifteen days of the due date.

However, other courts of appeal, recognizing the limitations contained in rule 21c, held that they lacked authority to permit late filing in the absence of a motion under rule 21c. *Briscoe v. Gulf Supply Co. Inc.,* 612 S.W.2d 88 (Tex. Civ. App.—Fort Worth 1981, writ ref'd n.r.e.); *In re Brazil,* 621 S.W.2d 811 (Tex. Civ. App.—Eastland 1981, no writ); *Mitchell v. Carter,* 545 S.W.2d 869 (Tex. Civ. App.—Waco 1976, no writ).

This conflict between the courts of appeal culminated in a decision by the Supreme Court of Texas in *B.D. Click Inc. v. Safari Drilling Corp.,* 638 S.W.2d 860 (Tex. 1982). Starting with the approval by Chief Justice Pope in the *Baylor Law Review, supra,* the supreme court expressly disapproved of the decision of the courts of appeal in *Wallace and Exposition Apartment Company* and held that:

> appellants motion for an extension of time to file a transcript and statement of facts must be filed within fifteen days of the last day for filing as prescribed by rule 21c.
>
> * * * *

The language utilized by Justice Barrow, speaking for a unanimous Supreme Court in *Click* is extremely significant and applicable to a rationalization to the question presented in this case. Justice Barrow stated:

> It must be recognized that the time limits prescribed by Rule 21c accomplishes an important purpose by fixing the date a judgment becomes final. Valuable property and personal rights are fixed as of that time. If a record may be filed at any time after the cost bond is timely filed a successful litigant will not know when the judgment becomes final. It is sig-

> nificant that Rule 21c was not revised in any manner by the 1981 amendment of the rules. To the contrary, the requirements of this rule were expressly affirmed in the revision of Rule 437. *This is clear indication that Rule 21c and 437 are viable and mean exactly what they say.*
>
> * * * *
>
> The record here establishes that appellant Click did not timely file the transcript and statement of facts *or file a motion for extension of time within fifteen days of the due date. Therefore, the court of civil appeals properly held that it did not have the authority to consider Click's motion for extension of time for filing the record.* (Emphasis supplied).

We wholeheartedly agree with Justice Barrow that rules mean what they say and are to be followed and are not to be disregarded or circumvented.

This court, in an opinion, written by Chief Justice Guittard, *Carrao v. Committee of the Unauthorized Practice of Law, State Bar of Texas,* 638 S.W.2d 183 (Tex. App.—[5th Dist.] 1982, no writ) held that, pursuant to the supreme court decision in *Click,* with regard to a motion heard by the court two weeks prior to the *Click* decision, it had erred by granting an untimely 21c motion to permit the filing of a statement of facts even when agreed to by the appellee. In holding that the court had no authority to consider either the statement of facts or the motion for rehearing, Chief Justice Guittard wrote:

> If we have no authority under the rules to consider a late motion to extend the time for filing the record, the same rules deny us authority to consider a motion for rehearing of a late motion. Consequently, our granting the motion for rehearing was erroneous and must now be set aside.

> Our authority in this respect is not affected by the appellees letter in response to the motion for rehearing stating that it had no objection to the late filing. Since the court had no authority to consider the late motion, such lack of authority is not a matter that can be waived by lack of objection.

Acknowledging that the Supreme Court of Texas has definitely announced that "rules mean what they say" and should be obeyed and not ignored, appellants revert to an application to this court to take for plenary jurisdiction to circumvent and evade the announced rule. We find no case law supporting this contention and while we reiterate that the court does have certain limited plenary authority we are of the opinion that to apply such authority in a manner contrary to the expressed rules in an extra-legal fashion is without authority in Texas Jurisdiction.

[7] Of course, it is not to be questioned that Texas courts do have inherent power to (1) enforce their judgments, (2) to correct clerical errors and (3) to declare that a prior judgment was void. None of these are applicable to this case. It has long been recognized that the power of Texas Courts to correct clerical, but not judicial errors at subsequent times is necessary and is not limited to a particular time. *Davis v. Preston,* 35 S.W.2d 403 (Tex. Comm'n App. 1931). The same power exists when a timely motion brings to the courts attention that the mandate on its face purports to adjudicate matters that were not before the court in that case. *O'Neil v. Mank Trucks Inc.*, 551 S.W.2d 32 (Tex. 1977), and the same rule applies where a mandate has prematurely been issued. *Brazell v. Murray,* 481 S.W.2d 801 (Tex. 1972).

However, the fact that this court has certain inherent power to correct clerical errors in its mandate does not aid appellants attempt to have this court act upon their late filed motion for rehearing in direct contravention of the rules of civil procedure.

It is the opinion of this court that when called upon to exercise plenary jurisdiction that extreme care and caution and very careful discretion should be exercised. We do not feel that this was done in the untimely and *ex parte* granting of the motion to set aside our prior decision of July 11, 1984.

The jurisdiction of the courts of appeal and their power and authority to act are directed by the Constitution of the State of Texas which itself contains express limitations upon such powers. Article 5 § 6 of the Constitution provides in relevant part:

* * * *

> (the) Court of Appeals shall have appellate jurisdiction co-extensive with the limits of their respective districts, which shall extend to all cases in which the district courts or county courts have original or appellate jurisdiction, *under such restriction* and *regulations as may be prescribed by law*, (Emphasis supplied).
>
> * * * *
>
> said court shall have such other jurisdiction, original and appellate, as may be prescribed by law
>
> * * * *

[8] Since the court of appeals derives its jurisdiction from the Constitution, the courts power and authority to act is limited and controlled by the statutes and rules

which govern its existence. These rules both create and limit the manner and method by which such power may be exercised. The Constitution, rules and laws are both inclusive of the power and authority of the court to act and exclusive of any authority to act in a manner inconsistent with the statute or rules. Thus, where a rule authorizes a court to act in a specific manner it shall not be done otherwise. *Bryan v. Sundberg,* 5 Tex. 209, 212 (1849); *County School Trustees of Lubbock Co. v. Harrell County Line Independent School District,* 95 S.W. 2d 204, 206 (Tex. Civ. App.—Amarillo 1936, no writ); *Heard v. Heard,* 305 S.W.2d 231, 235 (Tex. Civ. App. —Galveston 1957, writ ref'd).

In our research we have discovered the most fitting and relevant language which lays to rest any question concerning the proper answer to be questioned concerning the appropriate use of plenary authority. In *Duncan v. Magatte,* 25 Tex. 245 (1860) Justice Roberts used the following beautiful language:

> Justice is the dictate of right, according to the common consent of mankind generally, or of that portion of mankind generally who may be associated in one government, or who may be governed by the same principles and morals.
>
> Law is a system of rules, conformable, as must be supposed, to this standard, and devised upon an enlarged view of the relations of persons and things, as they practically exist. Justice is a chaotic mass of principles. Law is the same mass of principles, classified, reduced to order, and put in the shape of rules, agreed upon by this ascertained common consent. Justice is the virgin gold of the mines, that passes for its intrinsic worth in every case, but is subject to a varying value, according to the scales

through which it passes. Law is the coin from the mint, with its value ascertained and fixed, with the stamp of government upon it which insures and denotes its current value.

The act of molding justice into a system of rule detracts from its capacity of abstract adaptation in each particular case; and the rules of law, when applied to each case, are most usually but an approximation to justice. Still, mankind have generally thought it better to have their rights determined by such a system of rules, than by the sense of abstract justice, as determined by any one man, or a set of men, whose duty may have been to have adjudged them.

Whoever undertakes to determine a case solely by his own notions of his abstract justice, breaks down the barriers by which rules of justice are erected into a system, and thereby annihilates law.

A sense of justice, however, must and should have an important influence upon every well organized mind in the adjudication of causes. Its proper province is to superinduce an anxious desire to search out and apply, in their true spirit, the appropriate rules of law. It cannot be lost sight of. In this, it is like the polar star that guides the voyager, although it may not stand over the port of destination.

To follow the dictates of justice, when in harmony with the law, must be a pleasure; but to follow the rules of law, in their true spirit, to whatever consequences they may lead, is a duty. This applies as well to rules establishing remedies, as to those establishing rights.

What more can be said?

[9] We hold therefore, that the order of this court of October 4, 1984 vacating the judgment of this court

of July 11, 1984 was improperly granted and should be vacated.

SUMMARY AND CONCLUSIONS

For the reasons above given our order is as follows:

(1) Appellees motion to strike appellants motion to withdraw our order dismissing the appeal is granted;

(2) Appellees motion to reconsider our order of October 4, 1984, is granted;

(3) We set aside our order of October 4, 1984, vacating the judgment of July 11, 1984, and reinstate such order dismissing this appeal;

(4) Appellees motion for issuance of mandate is granted;

(5) Any costs incurred in these proceedings are assessed against appellants.

AKIN, STEPHENS, SPARLING, ALLEN, WHITHAM, GUILLOT, MALONEY, McCLUNG, and KEITH, JJ., join in the majority.

GUITTARD, C.J., dissenting, joined by CARVER, VANCE, DEVANY, HOWELL and MALONEY, JJ.

GUITTARD, Chief Justice, dissenting.

I agree with most of the majority opinion. I agree that on October 4, 1984, this court had plenary power over its judgment of July 11, 1984, dismissing the appeal. I agree that this power should be exercised with "extreme care and caution and very careful discretion." I agree that appellants' "motion to withdraw judgment granting appellees' motion to dismiss appeal," filed on October 3,

1984, had no legal effect and could not properly be treated as a motion for rehearing. I do not agree, however, that our order of October 4 vacating the dismissal was improper. I conclude, rather, that extraordinary circumstances intervening after September 7, 1984, when appellants' motion for rehearing was overruled, presented one of those rare situations that properly called for the application of this court's plenary power. Because of these circumstances, I would adhere to our order vacating the dismissal and would reinstate the appeal.

The majority opinion omits facts that I regard as crucial. This appeal was dismissed on July 11, 1984, on the ground that appellants were barred from further relief in the state courts because they sought and obtained a nullification of the state trial court's judgment in a federal court on a ground that they failed to raise in the state court. *Humble Exploration Co. v. Browning*, 677 S.W.2d 111, 113 (Tex. App.—Dallas 1984, no writ). This collateral review was successful in the federal district court, which held that the judgment of the state court was void on the grounds that the state court did not comply with the bankruptcy court's remand order and that it was conducted in violation of the automatic stay of 11 U.S.C. § 362. *Browning v. Navarro*, 37 B.R. 201, 210 (N.D. Tex. 1983), *rev'd and remanded*, 743 F.2d 1069 (5th Cir. 1984). Appellants filed in this court a "motion for rehearing of the order of dismissal," which was overruled in September 1984. Then on October 1, 1984, the United States Court of Appeals for the Fifth Circuit reversed the judgment of the federal district court, holding that under the facts of this case no attack upon the state court's jurisdiction could properly be made in the federal court action because the proceedings in the

state trial court were not contrary to the bankruptcy court's remand order or the automatic stay of section 362. *Browning v. Navarro*, 743 F.2d 1069, 1082, 1085 (5th Cir. 1984).

The opinion of the federal court of appeals was called to this court's attention by counsel for both parties. In fact, appellants' "motion to withdraw judgment granting appellees' motion to dismiss appeal" had no legal effect other than to call that opinion to our attention. Because that opinion raised serious questions concerning the basis of our judgment of dismissal, a majority of this court vacated our judgment of dismissal and invited the parties to submit written arguments. We acted *ex parte* in vacating our judgment of dismissal because we realized that appellants' time for filing an application for writ of error on our judgment of dismissal would have expired before this court could allow appellees the usual time to respond to appellants' motion to withdraw our judgment of dismissal. We recognized that appellees would not be prejudiced by this *ex parte* order because they would have full opportunity to present to us the contention that we had no further jurisdiction of the appeal and that we should allow the dismissal to stand. In response to our invitation, counsel have presented full briefs on the question of our plenary jurisdiction. I agree with the majority that we did have plenary jurisdiction over our judgment of dismissal. Moreover, I am persuaded, although the majority is not, that our plenary jurisdiction was properly exercised.

My analysis of the federal court of appeals' opinion has convinced me that it completely undermines our decision dismissing the appeal. We held that appellants should be limited to their remedy in the federal courts because,

by analogy to the doctrine of election of remedies as applied in such cases as *Saner-Whiteman Lumber Co. v. Texas & New Orleans Railway Co.*, 288 S.W. 127, 128 (Tex. Comm'n App. 1926, holding approved), when a litigant makes a choice between two inconsistent remedies for the same wrong, he should be bound by that choice. *Humble Exploration*, 677 S.W.2d at 115. We were persuaded that a litigant ought not to be able to speculate on a judgment in the state court by reserving a complaint not raised there for a subsequent attack on the judgment in the federal court in the event of an adverse judgment in the state court. Consequently, we concluded that a successful attack on the judgment in the federal court on a ground that could have been raised in the state court should preclude appellants from further relief in the state court system by way of appeal. In reaching that decision, we took the federal law as declared by Judge Sanders in the federal district court, which we interpreted to permit such review in federal court of state court proceedings for violation of conditions of remand by the bankruptcy court, *Humble Exploration*, 677 S.W.2d at 113 (citing *Browning*, 37 B.R. 201). We were concerned, also, that the availability of such federal-court review would jeopardize the authority of state courts to try and decide cases remanded from the bankruptcy court in accordance with state rules of procedure and recognized principles of state law. *Humble Exploration*, 677 S.W.2d at 114.

The decision of the federal court of appeals now casts an entirely different light on the matter. That court has decided that the remedy appellants sought in the federal courts is not available to them. Moreover, that court has strongly indicated in its opinion that the federal courts

have no disposition to interpret their exclusive powers under the Bankruptcy Act to authorize the imposition of conditions inconsistent with state law on cases remanded by the bankruptcy court for trial in a state court. In view of that opinion, it appears that these appellants had no opportunity to speculate on the state court judgment and avoid an adverse result by raising in a federal court proceeding a ground not raised in the state court.

Accordingly, we must now decide whether appellants' unsuccessful attempt to pursue in the federal courts a remedy not available there precludes them from obtaining a review of the judgment by our court. Our analogy to the doctrine of election of remedies suggests that appellants are not precluded by their attempt to pursue an unavailable remedy. The established rule in Texas is that the doctrine of election requires that two inconsistent remedies be available; consequently, an attempt to enforce a supposed but nonexistent remedy does not constitute an election. *Poe v. Continental Oil & Cotton Co.*, 231 S.W. 717, 719 (Tex. Comm'n App. 1921, holding approved); *Schwarz v. National Loan & Investment Co.*, 133 S.W.2d 133, 136 (Tex. Civ. App.—Dallas 1939, writ ref'd). Texas courts have regarded the doctrine of election with disfavor and have refused to extend it. *Custom Leasing, Inc. v. Texas Bank & Trust Co.*, 491 S.W.2d 869, 871 (Tex. 1973). I can find no authority applying the doctrine of election in a situation like the present.

Nor can I agree with appellees' contention that a collateral attack based on the contention that a judgment is void is necessarily inconsistent with an appeal complaining of other errors. In *Winters Mutual Aid Association Circle No. 2 v. Reddin*, 49 S.W.2d 1095, 1096-97

(Tex. Comm'n App. 1932, holding approved), the supreme court refused to dismiss an appeal although the appealing party had filed a bill of review in the trial court attacking the same judgment on equitable grounds. The supreme court approved the holding of the commission of appeals that the two remedies were not inconsistent. *Winters,* 49 S.W.2d at 1097. In accord with *Winters,* I conclude that appellants' unsuccessful claim in the federal court that the judgment is void is not in itself such an inconsistent position as to require dismissal of this appeal.

Appellees insist further, however, that appellants have forfeited their right of appeal here because they did, in fact, trifle with the state trial court by failing to raise there their contention of lack of jurisdiction resulting from the alleged violation of the remand order and then only presenting that claim in the federal court after suffering an adverse judgment in the state court. This argument is untenable in the light of the federal court of appeals' holding that the state trial court had full jurisdiction under the provisions of the remand order. I cannot agree that appellants should be penalized for failing to raise a contention in the state court that would not have been well taken and could not have been properly sustained there even if it had been raised.

In dismissing the appeal on July 11, we were convinced that appellees should not be burdened with dual review of their judgment in both state and federal court systems, as the federal district court opinion appeared to allow. *Humble Exploration,* 677 S.W.2d at 114-15. Since the federal court of appeals has now held that no dual review is available in this case, our present question is whether appellants, by their attempt to pursue an unavailable

remedy, have forfeited their right of review in this court. In the light of the present record, I do not regard the federal court action as an improper delaying maneuver. The federal court action in which the judgment was attacked was not initiated by appellants, but by appellees, who sought enforcement of their judgment in the federal court because of the pendency of the bankruptcy proceedings. The bankrupt appellants, being unable to post a supersedeas bond, advanced an argument which, although it was ultimately rejected by the federal court of appeals, was plausible enough to convince the United States district judge that the state court judgment was void. I cannot say that this unsuccessful employment of the art of advocacy to resist enforcement of a judgment pending appeal was so reprehensible as to forfeit appellants' right to have that judgment reviewed for whatever errors may have been committed in the state court.

The majority opinion cites cases holding that this court has no power to extend the time prescribed by rule 458[1] for filing a motion for rehearing except on a motion to extend complying with rule 21c. Those authorities, in my view, do not limit our plenary power over our judgments, which, as the majority recognizes, continues until the end of the term in which they were issued or until an application for writ of error is filed. The time for filing a motion for rehearing has nothing to do with the duration of the court's plenary power after a motion for rehearing has been overruled. Whether an appellate court can extend the time for filing a motion for rehearing without a timely motion to extend and whether such a motion can be considered as a predicate for an applica-

1. All references in the opinion to "rules" are to the Texas Rules of Civil Procedure.

tion for writ of error are separate questions that are irrelevant to our present problem. If the court retains until the end of the term the plenary power to act sua sponte, then the filing of an untimely motion cannot operate to limit that power. Although our order of October 4 recites the filing of appellants' "motion to withdraw judgment," it does not provide that the motion is granted; rather it is consistent with the exercise of our plenary jurisdiction sua sponte. Of course, if we had jurisdiction to act sua sponte, as the majority concedes, an order purporting to grant an untimely motion would not be ineffective to vacate our earlier judgment if the order provided, as this order does, that the earlier judgment was vacated. I agree that no order of this court could give an untimely motion validity as a predicate for an application for writ of error to the supreme court.

This interpretation of rule 458 is supported by *Wilson Independent School District v. Weaver,* 143 Tex. 530, 187 S.W.2d 221, 222 (1945). In that case the supreme court upheld the action of the intermediate court in setting aside its original judgment and rendering a different judgment after a motion for rehearing had already been overruled. The supreme court held that even expiration of the term did not preclude this reconsideration because at the end of the term a motion to certify questions to the supreme court was pending. (This motion was granted in the next term, but certification was not permitted by the supreme court.) Thus, *Wilson Independent School District* stands for the rule that an appellate court's plenary power to reconsider and change its judgments extends to a succeeding term, even though a motion for rehearing has been overruled, if any other matter is properly pending before the appellate court at the expiration of the

term. Our reconsideration here need not go that far because on October 4, when we vacated our order of July 11 dismissing the appeal, the term had not expired.

Further support for my interpretation of the court's plenary power is found in *Garrett v. Katz,* 27 S.W.2d 373, 374 (Tex. Civ. App.—Dallas 1930, no writ), where this court corrected a judgment to delete recovery on a supersedeas bond "as the term of court at which it was entered had not ended." By its nature, the court's plenary power is not limited to the correction of clerical errors and the like. The power to correct clerical errors, etc., continues even though the court's plenary jurisdiction has expired with the end of the term. *Knox v. Long,* 152 Tex. 291, 257 S.W.2d 289, 293 (1953); TEX. R. CIV. P. 316, 317; *see also Finlay v. Jones,* 435 S.W.2d 136, 138 (Tex. 1969). Moreover, the present problem is not affected by *B.D. Click Co. v. Safari Drilling Corp.,* 638 S.W.2d 860 (Tex. 1982), and the other decisions holding that an appellate court has no authority to consider a late-filed record unless it has granted a timely motion to extend in compliance with rule 21c. I agree with the majority that rule 458, like the rules covering the times for filing records, means what it says and must be given effect when applicable. Our authority to consider a late record, however, is not analogous to our plenary power over our judgments. The former is limited by the rules, as held in *Click* (and by rule 386 as recently amended), while the latter continues, as even the majority recognizes, until the end of the term or until an application for writ of error is filed. Application of the *Click* rule to the present situation would nullify the doctrine of plenary power and leave the appellate court with no power over its judgment after a motion for rehearing has been over-

ruled or, in absence of a timely motion for rehearing, the time for filing such a motion has expired, notwithstanding the continuation of the court's term, which begins and ends with the calendar year, as provided by TEX. REV. CIV. STAT. ANN. art. 1816 (Vernon Supp. 1984).

For the reasons stated, I conclude that the extraordinary circumstances of this case present a situation in which this court should exercise its plenary jurisdiction and give appellants an opportunity to present their appeal. Although they have complied with all applicable rules, have filed an extensive record, and have prepared an elaborate brief, they have been denied their right of review of a multi-million dollar judgment on the ground that they pursued an inconsistent remedy in the federal courts, a remedy now held to be unavailable by the federal court of appeals. Consequently, I would adhere to our order of October 4 vacating our dismissial order of July 11 and would set the case for submission and oral argument.

CARVER, VANCE, MALONEY, DEVANY, and HOWELL, JJ., join in the dissent.

APPENDIX F

IN THE SUPREME COURT OF TEXAS

* * * * *

NO. C-4129

July 3, 1985

HUMBLE EXPLORATION COMPANY, INC. ET AL.

v.

JANE H. BROWING ET AL.

From Dallas County Fifth District

Application of petitioners for writ of error to the Court of Appeals for the Fifth Supreme Judicial District, together with petitioners' motion to expedite consideration, respondent's motion to expedite consideration, and respondent's motion to strike application, having been duly considered, it is ordered that said motions to expedite consideration be, and hereby are, granted, and motion to strike is overruled. Furthermore, the Court having determined that said application presents no error requiring reversal of the judgment of the Court of Appeals, it is ordered that said application be, and hereby is, refused. (Justice Robertson not sitting).

It is further ordered that applicant, Humble Exploration Company, Inc. et al., pay all costs incurred on this application.

* * * * *

NO. C-4129

30 October 1985

HUMBLE EXPLORATION COMPANY, INC. ET AL.

v.

JANE H. BROWNING ET AL.

From Dallas County Fifth District

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled. (Justice Robertson not sitting)

I, MARY M. WAKEFIELD, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the Orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and seal of the Supreme Court of Texas, at the City of Austin, this, the 9th day of December, 1985.

MARY M. WAKEFIELD, Clerk

By: /s/ COURTLAND CROCKER
Courtland Crocker
Deputy Clerk

[SEAL]

APPENDIX G

Jane H. BROWNING et al., Relators,

v.

The Honorable John L. PLACKE,
Judge, et al., Respondents.

No. C-4425.

Supreme Court of Texas

October 30, 1985.

District court judgment was entered declaring that original judgment of another district court was void for failure to join indispensable parties, and mandamus proceeding was brought. The Supreme Court held that absent showing that original district court lacked jurisdiction, district court in second proceeding had no authority to declare original judgment void.

Writ conditionally granted.

R. Jack Ayres, Jr., Thomas V. Murto, III, Jeff R. Boggers and Larry B. Dwight, Dallas, W. James Kronzer, Jr., Houston, Scott, Douglass & Luton, Frank Douglass and Steve McConnico, Austin, for relators.

Dale Ossip Johnson, Austin, Pat S. Holloway, Gidding, James H. Keahey, Jack Ratliff, Lynch, Chappell, Allday & Alsup, Thomas T. Rogers and Wallace M. Smith, O'Neill, Haase & White, Rex H. White, Jr., Austin, for respondents.

PER CURIAM.

This original mandamus proceeding presents the question whether a district court may declare void the judgment of another district court. We hold that absent a showing that the prior court lacked jurisdiction, no such declaration is permissible.

In 1982, the Brownings recovered a judgment against Humble Exploration Company, Pat S. Holloway, and others. This judgment, rendered by the 162nd District Court of Dallas County after a jury trial, imposed a constructive trust on Humble/Holloway assets and awarded the Brownings actual and exemplary damages totaling $72 million. Humble/Holloway appealed the judgment. The court of appeals dismissed the appeal because Humble/Holloway had elected to simultaneously challenge the judgment in federal court. Humble/Holloway then filed an application for writ of error in this court, complaining of the dismissal by the court of appeals. This court refused that application, no reversible error.

In June 1985, Humble, Holloway, Holloway family members, and others filed several suits in the 21st District Court of Lee County. One complaint in those suits was that persons who had royalty interests in Humble and persons who had interests in Holloway's assets were not joined in the Dallas district court proceeding, making the judgment in that case void. Numerous other complaints were also made, including that assets were mishandled by a receiver, that the Dallas district court failed to give Humble/Holloway a fair trial, and that because of the Dallas district court proceedings, Humble/Holloway and other plaintiffs were entitled to damages for libel, slander,

invasion of privacy, interference with business relations, and malicious prosecution.

On August 28, 1985, the Lee County district court rendered an "Order Overruling Special Appearances, Pleas to the Jurisdiction, in Abatement, to Dismiss, of Res Judicata and Collateral Estoppel and Claim of Non-Suit and Abandonment of Claims." Signed after a temporary injunction hearing, this order found *inter alia* that Holloway family members and royalty owners were indispensable parties to the Dallas district court action but were not joined therein; That Humble and Holloway were denied a fair trial; and, that constructive trusts imposed in the judgment were faulty. The court then declared that for those reasons and others, the Dallas district court judgment is "void in law *ab initio* and without any legal force or effect."

[1-5] Unless a juudgment of a court of general jurisdiction is void, it is not subject to collateral attack in another court of equal jurisdiction. *Austin Independent School District v. Sierra Club,* 495 S.W.2d 878, 881 (Tex. 1973). And a judgment is void only when it is shown that the court had no jurisdiction of the parties or property, no jurisdiction of the subject matter, no jurisdiction to enter the particular judgment, or no capacity to act as a court. *Id.* A failure to join "indispensable" parties does not render a judgment void; there could rarely exist a party who is so indispensable that his absence would deprive the court of jurisdiction to adjudicate between the parties who are before the court. *Cooper v. Texas Gulf Industries, Inc.*, 513 S.W.2d 200, 204 (Tex. 1974). All errors other than jurisdictional deficiencies render the judgment merely voidable, and such errors must be corrected on direct attack. When time for direct

attack by appeal has elapsed, a bill of review in the court rendering the initial judgment is the exclusive remedy to attack the judgment. *Middleton v. Murff*, 689 S.W.2d 212 (Tex. 1985).

[6] The Lee County district court has declared void a judgment which has not been shown to have been rendered by a court without jurisdiction to do so. Because that action conflicts with *Austin Independent School District v. Sierra Club*, 495 S.W.2d 878 (Tex. 1973), we grant leave to file the petition for writ of mandamus and, without hearing oral argument, conditionally grant the writ of mandamus. Should Judge Placke fail to vacate his order declaring the Dallas district court judgment void, the writ of mandamus will issue. Tex. R. Civ. P. 483.

APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No.3-82-1846-H

PAT S. HOLLOWAY, et al.,
Plaintiffs

v.

JUDGE DEE BROWN WALKER, et al.,
Defendants

(Filed March 11, 1985)

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendant R. Jack Ayres, Jr.'s Motion for Summary Judgment and to Dismiss, filed December 31, 1984; Plaintiffs' Response, filed January 20, 1985; Defendant's Reply, filed February 11, 1985; and Plaintiffs' Response, filed March 4, 1985.

Factual Background

The trial setting of this case will have come and gone if the Court attempts to narrate all of the facts, challenges to facts, negative facts and subfacts that have survived a series of battles by affidavit and deposition. The following, however, is an aerial reconnaissance of the current deployment of the combatants.

Plaintiffs were unsuccessful litigants in a state court consolidated trial of *Jane H. Browning v. Pat S. Holloway*

and *Fairway Land Company v. Humble Exploration Company, Inc.*, presided over by Defendant Walker in the 162nd District Court of Dallas County. As a result, Defendants Browning Interests were awarded damages and a constructive trust over most of the assets of Plaintiff Humble Exploration Company, Inc.[1] Plaintiffs here have appealed that state court judgment. Subsequent to the filing of this case, that appeal was dismissed on the ground that Plaintiffs (appellants) had taken inconsistent positions in their appeal and in *Browning v. Navarro*, CA-3-83-0380-H, also pending on this Court's docket. After the Fifth Circuit reversed this Court's finding that Judge Walker had no jurisdiction to try the state court case due to a violation of the bankruptcy court's remand order, *see* 743 F.2d 1069 (5th Cir. 1984), Plaintiffs have attempted to reinstate their state appeal. The success of that effort has been awaiting determination for the past few months.

In this action, brought under 42 U.S.C. § 1983 and a multitude of pendent state law claims, Plaintiffs have alleged that their opponents in the state court and their attorneys, conspired to have the case brought before Defendant Walker, who was allegedly predisposed to their effort by the provision of various legal and political services to him without charge in the past. It is further alleged that the conspiracy to rig the outcome of the trial was furthered through various *ex parte* meetings, and through the participation of Defendants Wright, Sessions and Hurt, the receiver placed in control of Humble by Defendant Walker, the receiver's attorney and accountant,

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1. It has been suggested in papers filed in other manifestations of this litigation that Humble has been renamed as the result of an unrelated settlement with Exxon. Nevertheless, the use of the name Humble will persist here.

respectively. This Court previously denied all of the parties' motions to dismiss.[2]

The Procedural Due Process Claim

In § 163 of Plaintiffs' First Amended Complaint, they state:

> Plaintiffs would show that the Defendants, by their foregoing acts and omissions violated 42 U.S.C. § 1983, by acting under color of state law, and thereby deprived Plaintiffs of their rights secured by the due process clause of the Fourteenth Amendment to the United States Constitution.

In clarification, Plaintiffs subsequently stated that Defendants conspired "in particular to deprive Plaintiff Holloway of his lawful use, right and title to one hundred (100%) percent ownership in and control over Humble and Sterling without due process of law. Plaintiffs' Status Report, filed April 7, 1983. Plaintiffs are thus arguing an intentional deprivation of property without due process under color of state law.

Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprviation of any rights, privileges, or immunities secured by the Constitution and laws, shall

---

2. It should be observed that the standards of pleading a case of this nature have been dramatically heightened in this Circuit since this Court's review of the complaint. *See Elliott v. Perez*, slip op. at 2246 (5th Cir. 1985).

> be liable to the party injured in an action at law, suit in equity, or other proper proceedings for redress.

This deceptively straightforward provision has, in recent years, been placed before the judicial telescope to reveal a cratered and tortured landscape. As has recently been observed, its facial simplicity belies a variety of indeterminate facets to ponder:

> Section 1983 does not expressly provide for the type of mental state required by the tortfeasor, whether it be negligence, intentional or strict liability. It does not provide for an exhaustion-of-remedy rule in state court as a condition precedent to maintaining a § 1983 action in federal court. It does not state that if there is an adequate remedy at state law and in state court for the act committed, one is precluded from maintaining a § 1983 action in federal court. It makes no reference to immunities. It does not establish a priority between various constitutional rights, such as liberty or property under the Due Process Clause. It does not distinguish between procedural and substantive due process.

Eaton v. City of Solon, 598 F.Supp. 1505, 1509 (N.D. Ohio 1984). Nevertheless, such are the preoccupations of Civil Rights Act jurisdrudence. This Court now turns to ponder one of these concerns.

Adequate State Remedy: You Can't Get Here from There

The Supreme Court has held that it is unnecessary to exhaust administrative or judicial remedies as a condition precedent to maintaining a § 1983 action. *Patsy v. Florida,* 457 U.S. 496 (1982); *Monroe v. Pape,* 365 U.S. 167 (1961). The decision in *Patsy* rested primarily

on an analysis of the legislative history of Section 1 of the Civil Rights Act of 1871, 17 Stat. 13, the forerunner of Section 1983, and the Civil Rights of Institutionalized Persons Act ("CRIPA"), 42 U.S.A. § 1997. In light of the original purposes of the 1871 Act, and the timidity with which Congress added a narrow and circumscribed exhaustion requirement to CRIPA, the Court concluded that a broader exhaustion doctrine in Section 1983 cases was not mandated. The Court stated that "[i]t is not for us to say whether Congress will or should create a similar scheme for other categories of § 1983 claims or whether Congress will or should adopt an altogether different exhaustion requirement for non-prisoner § 1983 claims." 457 U.S. at 515.

Having laid it down that exhaustion was not required, the Court appeared to retire from the field, leaving the matter of further inroads on its non-exhaustion rule for Section § 1983 actions to the Congress. *Collins v. King*, 743 F.2d 248, 251 (5th Cir. 1984). The judicial hibernation was to be all too brief, as a corollary doctrine applicable only to procedural due process cases waited in the wings. *Id.*

For a well-rounded view of our present status, *Parratt v. Taylor*, 451 U.S. 527 (1981) must be laid on the table. In *Parratt*, the Supreme Court held that a Nebraska state prisoner had failed to allege a violation of the due process clause of the fourteenth amendment in his suit to recover the value of a hobby kit, negligently lost by prison employees. Although the Court termed the injury sustained by the prisoner a deprivation of property under color of state law, it was not a cognizable constitutional injury because it was not "without due process of law." 451 U.S. at 537. The critical factor was the existence of an

adequate post-deprivation remedy in the form of a tort suit in state court.

Following a split among the circuits on whether *Parratt* applied to intentional deprivations, the other shoe fell in the guise of *Hudson v. Palmer,* 104 S. Ct. 3194, 3203-04 (1984), answering the question in the affirmative: "We hold that an unauthorized intentional deprivation of property by a state employee does not constitute a violation of the procedural requirements of the due process clause of the fourteenth amendment if a meaningful post-deprivation remedy for the loss is available." *Id.* The *Parratt-Hudson* doctrine defines and limits the constitutional right itself, rather than the remedy. *Thibodeaux v. Bordelon,* 740 F.2d 329, 337-38 (5th Cir. 1984).

The existence of the state process does not immediately torpedo the Section 1983 claim. It is, however, incumbent on the plaintiff to prove that the state remedy is inadequate. *See Marshall v. Norwood,* 741 F.2d 761, 764 (5th Cir. 1984); *Vicory v. Walton,* 721 F.2d 1062, 1066 (6th Cir. 1983), *rehearing en banc denied,* 730 F.2d 466 (6th Cir. 1984). The inadequacy does not, however, necessarily stem from a lack of congruency between the state and federal relief available, *Loftin v. Thomas,* 681 F.2d 364, 365 (5th Cir. 1982). More relevant is an unreasonable delay in providing the remedy, *Eaton,* 598 F.Supp. at 1512, or unreasonable barriers to its availability. The fundamental requirement of due process is the opportunity to be heard and it is an opportunity which must be granted at a meaningful time and in a meaningful manner. *Armstrong v. Manzo,* 380 U.S. 545, 552 (1965). *See also Logan v. Zimmerman Brush Co.,* 455 U.S. 422 (1982).

Plaintiffs allege a deprivation of an ownership interest in certain property. This deprivation allegedly resulted from the intentional acts of a state employee and private individuals engaged in a conspiracy with him. These predicates are squarely within the *Hudson* framework.

Defendant urges that the appellate process constitutes an adquate state remedy for the deprivation. He cites *Cohen v. City of Philadelphia,* 736 F.2d 81 (3d Cir. 1984). Cohen, a police officer, was dismissed from his employment because of suspected participation in a burglary. After acquittal, he was reinstated without an award of back pay. He sued under Sections 1983 and 1985 claiming a deprivation of property without due process for the refusal of the Civil Service Commission to grant him back pay. The Third Circuit held that no § 1983 claim was established because Pennsylvania provided for judicial review of the Commission's actions and the courts were empowered to correct any of the Commission's actions if they were "manifest abuses of discretion, are contrary to law, or rest on findings of fact which are not supported by substantial evidence." 736 F.2d at 86. To rule otherwise would create the danger that:

> any plaintiff in a state court who was asserting a right within the broadly defined categories of liberty or property and who lost his case because the judge made an error could attack the judgment indirectly by suing the judge under section 1983. That would be an intolerable interference with the orderly operations of the state courts. Due process is denied in such a case only if the state fails to provide adequate machinery for the correction of the inevitable errors that occur in legal proceedings. (citations omitted).

Obviously, Plaintiffs here are alleging transgressions more serious than "inevitable errors", but it is such trans-

gressions that give rise to the intentionality of the deprivation. The concerns are the same.

Plaintiffs' description of the improprieties at trial before Defendant Walker range from subtle to flagrant disregard of applicable substantive and procedural law. Virtually all of these matters, including the allegations of bias, are among the 211 points of error urged on appeal from the state court trial. *See* Attachment to Defendant Wright's Motion for Summary Judgment, filed February 25, 1985; *Compare, e.g.*, Points of Error 10-12 *with* First Amended Complaint ¶¶ 46-60 and *passim;* Points of Error 20-24 *with* ¶¶ 87-88; Points of Error ¶¶ 74-79 *with* ¶¶ 92-94, 99-101; Points of Error ¶ 61 *with* ¶ 105; Points of Error *passim with* ¶¶ 115-116; Point of Error ¶ 54 *with* ¶ 117; Point of Error ¶ 67 *with* ¶ 121; Point of Error ¶ 19 *with* ¶ 51; Points of Error ¶¶ 96-100 *with* ¶¶ 133-136; Points of Error ¶¶ 200-201 *with* ¶ 140. In other words, the acts evidencing and causing the deprivation are, for the most part, errors of law raised on appeal.

The state appellate courts have the power and responsibility to correct errors of law committed at the trial court level. The state courts are empowered to grant the relief of reversal and/or the provision of a new trial, a direct redress that this Court can, at best, approach indirectly.

In addition to the undoing of the allegedly erroneous resolution of the trial, state law provides remedies for damages associated with improper legal action, such as causes of action for wrongful and negligent receivership, asserted in this action, and malicious prosecution.

Plaintiffs argue that Defendant Ayres is estopped from asserting that the right of appeal constitutes an adequate remedy because of "his strenuous efforts" to deny Plain-

tiffs their right to appeal. This contention is irrelevant. Regardless of Defendant Ayres' successful or unsuccesful advocacy before the Dallas Court of Appeals, other Defendants, whose hands are arguably cleaner, can and have asserted the same objection to Plaintiffs' constitutional claim. It is irrelevant for this analysis whether Plaintiffs are successful on their appeal, or have run afoul of the appellate process. The due process doctrine does not require the Court to track the eventual disposition of inmate Taylor's tort claim or Plaintiffs' appeal. It is the existance of an available remedy that limits the right.

Accordingly, the Court is of the opinion that Defendant's Motion for Summary Judgment should be granted with respect to Plaintiffs' procedural due process claim.

Substantive Due Process

Plaintiffs raise explicitly for the first time the contention that their due process claim is also a substantive one. *See* Plaintiffs' Response to Reply. Specifically, Plaintiffs state that their claim is for a violation of the constitutional right to a fair trial. The Amended Complaint is broadly-worded enough to support this claim.

Substantive due process is a nebulous concept at best. *Barnier v. Szentmiklosi,* 565 F.Supp. 869, 879 (E.D. Mich. 1983). It seems to have its origins in Justice Cardozo's notion of immunities "implicit in the concept of ordered liberty". *Id., citing Palko v. Connecticut,* 302 U.S. 319, 325 (1937). In *Rochin v. California,* Justice Frankfurter appeared to define the fourteenth amendment's substantive prohibition to conduct "that shocks the conscience" or "offends the community's sense of fair play and decency". 342 US.. 165, 172 (1952).

The existence of an adequate state remedy and the reasoning of *Parratt* do not apply to cases of substantive due process violations, because the state is forbidden to deprive one of the right in question under any circumstances, regardless of the process provided. *Duncan v. Poythress,* 657 F.2d 691, 704 (5th Cir. 1981), *cert. dismissed,* 459 U.S. 1012 (1982); *Nika Corp. v. City of Kansas City,* 582 F.Supp. 343, 360-61 (W.D. Mo. 1984). The right to a fair trial, before an unbiased judge, is a basic requirement of due process, *Nebraska Press Association v. Stuart,* 427 U.S. 539, 551 (1976); *Johnson v. Mississippi,* 403 U.S. 212 (1971), and is actionable under Section 1983. *Neal v .Brim,* 506 F.2d 6, 9 (5th Cir. 1975).

Plaintiffs allege that the rendition of free legal services by Defendants Kelsoe, Sessions and Wright and accounting services by Defendant Hurt several years prior to this litigation served as an inducement for Defendant Walker to be predisposed to Defendants' case. Plaintiffs' Response at 30. Defendant cites to Plaintiff Holloway's statement in a deposition that he was alleging the receipt of a bribe, Defendant's Exhibit 2 at 149, and proceeds to argue that the allegations do not meet the requirements of the criminal bribery statute. As Plaintiffs reply, this is not the point. The issue is a factual, not legal one, concerning whether Defendant Walker was motivated to act, be it out of agreement or gratitude, by the previous actions of Defendants.

Membership in Conspiracy

Plaintiffs allege that Defendant Ayres participated in a conspiracy with Defendant Walker to deprive them of their right to a fair trial. Of Course, merely resorting to the courts and being on the winning side of a lawsuit does

not make a party a co-conspirator or a joint-actor with the judge. *Dennis v. Sparks,* 449 U.S. 24, 28 (1980). More than a blanket of accusation is necessary to support a § 1983 claim. *Arsenaux v. Roberts,* 726 F.2d 1022, 1024 (5th Cir. 1982).

Thus, Plaintiffs must show by competent summary judgment evidence that Defendant Ayres' participated in an agreement to get the state court case improperly brought before Defendant Walker, or, once before him, agree to induce the judge to improperly rule.

Defendant provides an affidavit from an employee of the Dallas County District Clerk's Office present at the filing of the case in 1982. Martin Affidavit, Defendant's Exhibit 5. She attests that the case was "assigned to the 162nd Judicial District court solely by means of the random mechanical filing system then in use in the District Clerk's Office on May 26, 1982". Affidavit at 3. She further swears that no one tried to have her file the case in Defendant Walker's court. Plaintiffs attempt to rebut this with an affidavit from Burke Wylie, an employee of the Dallas County Auditor's office, describing an Administrative Order announcing the adoption of a new computerized filing system in June of 1982. Plaintiffs' Exhibit 1. The adoption of a random computerized system does not contradict the previous existence of a random "mechanical" system, as Defendant states.

Plaintiffs further present excerpts from depositions concerning widespread rumors of potential for forum shopping. Plaintiffs' Exhibit 2 contains only the grossest forms of hearsay, as Plaintiffs concede. *See* Plaintiffs' Reply to Motion to Strike, filed March 5, 1985. Assuming that the deponent in Exhibit 3, Judge Snodgrass can somehow

be qualified as an expert in docket control, as Plaintiffs argue, his testimony only states that there were rumors regarding forum-shopping in the 1970's and that an investigation failed to confirm the rumors. This evidence is insufficient to raise a fact issue concerning the filing of the case.

Turning to the events after the assignment of the case to Judge Walker, Plaintiffs base the inference of a conspiratorial agreement on the following:

> 1. Defendants Ayres, Kelsoe, Walker and former Defendant Mussiewhite, attorney for the APP entities, met in Judge Walker's chambers immediately following filing of the suit. Albright Affidavit at 3, Plaintiffs' Exhibit 17. Albright concluded that this meeting concerned the merits of the case, because Walker greeted Albright, attorney for Humble, with the *sua sponte* proclamation, "Is this the man with the 8 million doliars?" Plaintiffs' Response at 10.
>
> 2. Defendant Ayres, Kelsoe and Walker conducted regular *ex parte* meetings with Defendant Walker before the beginning of trial, at noon, and at the end of the day, to which Plaintiffs' counsel were not invited. Bickel Affidavit, Plaintiffs' Exhibit 19; Albright Affidavit; Plaintiffs' Response at 16.
>
> 3. On the morning of August 16, 1982, Defendants Walker, Ayres, Hurt and Sessions met to discuss the special issues to be submitted to the jury. Hughes Affidavit, Plaintiffs' Exhibit 29.

Defendant, despite his affidavit to the contrary, acknowledges that there may be a question of fact regarding *ex parte* meetings. Response at A-8. He argues that there

is no evidence that counsel for Humble or Holloway were excluded from any such meetings if they had chosen to attend, as the meetings often appeared to be in plain view of Plaintiffs' counsel. Defendant further states that Plaintiffs' counsel frequently and voluntarily absented themselves from the proceedings. Defendant's Exhibit 4 at 8. Given the frequency of *ex parte* meetings alleged, there is indeed a fact question on the nature of these meetings.

Defendant argues that even accepting the existence of the *ex parte* meetings, they are insufficient as a matter of law to substantiate a conspiratorial agreement. He cites *Schaffer v. Cook*, 634 F.2d 1259, 1260 (10th Cir. 1980), where the court held insufficient an allegation that the Plaintiff saw one of the attorneys speak with the judge in the courthouse before each hearing. The court stated, "Nothing in the complaint indicates that the court or the attorneys were acting outside of the confines of the neutral function of a judicial forum." *Id.* The mere allegation of an occurrence of an *ex parte* meeting is indeed insufficient to raise a fact issue of an impropriety occurring during them. *San Filippo v. U.S. Trust Co. of New York, Inc.*, 737 F.2d 246, 256 (2d Cir. 1984). The presence of Defendant Ayres at an *ex parte* meeting at which Defendant Walker announced the decision to submit jury issues on "our" theory of the case goes beyond these precedents.

This factual issue, on a question sufficient to support an inference of a conspiratorial agreement, precludes the grant of summary judgment on the substantive due process claim as to Defendant Ayres.[3]

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3. It appears that Plaintiffs also argue that the acts of co-conspirators can be imputed to show Defendant Ayres' agreement. The vicarious liability cannot be so extended; it only governs the fixing of liability once one's membership in the conspiracy is proven.

Subject Matter Jurisdiction

Defendant Ayres' reasserts the contention that a federal court lacks subject matter jurisdiction to, in effect, review the legal determinations of a state court.

In ruling on the various motions to dismiss, this Court relied on *Patsy, supra,* holding that because the alleged harms resulted not from the judicial decision-making functions of the state court, but from alleged improprieties in the conduct of judicial personnel and others, jurisdiction was proper.

Subsequent to this ruling, the Court's attention has been drawn to United States Supreme Court's clarification of this principle. In *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983), a § 1983 due process case brought by an attorney denied permission to practice before the D.C. Court of Appeals, the Court stated that a federal district court "has no authority to review final judgments of a state court in judicial proceedings". 103 S. Ct. at 1315. Rejecting the proposition that a constitutional complaint necessarily evades this principle, the Court stated:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with a state court's denial in a judicial proceeding of a particular plaintiff's application for admission to the state bar, then the District Court is in essence being called upon to review the state court decision. This the District Court may not do.

Id. at 1315 n.16.

In *Hagerty v. Succession of Clement,* 749 F.2d 217 (5th Cir. 1984), the plaintiff, an unsuccessful challenger to a will in a state court probate suit, brought a § 1983

action against the estate, the executor of the will, the state trial judge, and the clerk of the court, alleging that the state proceedings and the various actions of the trial judge had deprived him of property without due process of law. The Fifth Circuit affirmed the district court's dismissal under Rule 12(b)(1). The court stated:

> The constitutional claims presented by Hagerty to the federal district court, if not identical, were "inextricably intertwined with the state court's denial" of relief; therefore the district court could not have properly reviewed the state court decision. [citing *Feldman*]. To the extent that there was any constitutional error in the Louisiana state court decision, sole recourse for Hagerty was to the United States Supreme Court, not to the federal district court.

Defendant argues that in order to grant Plaintiffs all or any part of the relief sought, "the court will be obliged to decide matters of fact and/or law which have previously been decided, adverse to the Plaintiffs' claims in the state courts, and to judge for itself the ultimate correctness, intent or validity of the state court's actions and decisions." Response at 19.

Plaintiffs respond that the primary relief sought is not to remand or reverse the state judgment, but to redress Plaintiffs monetarily and punish the conspirators for actions beyond the wrongful procurement of the state judgment. They state that "the merits of the state court proceedings are not at issue in this case" and that "a substantive appellate review of the correctness of various rulings made by Judge Walker" will not be required. Response to Reply at 11.

The Court accepts most of what both parties argue. Plaintiffs may be entitled to recover damages for the

deprivation of their right to a fair trial. These damages would most likely be nominal, and would not include the value of the judgment awarded against them. *Carey v. Piphus*, 435 U.S. 247 (1978). To prevail on this theory, Plaintiffs must factually and legally prove that an unfair trial was received *without regard to the validity* of Judge Walker's legal rulings and the outcome of the trial.[4] This limitation is mandated by and consistent with *Feldman*, *Hagerty* and the intent of this Court's earlier ruling on this issue.[5]

Although such erroneous rulings, according to Plaintiffs' theory, may be probative of the implementation of the alleged agreement to deprive Plaintiffs of their right to a fair trial, their constitutional significance is most certainly and indisputably intertwined with the state court's denial of relief. *Hagerty, supra.*

To grant much of Plaintiffs' requested relief, both legal and equitable, this Court would have to examine Judge Walker's rulings to determine which were harmless and which were reversible, causing damage. Such a review is forbidden.

The Court believes that this inquiry is not necessarily preempted by Judge Rolston's denial of Plaintiffs' motion to recuse Judge Walker. The Court is not being asked to provide relief that Judge Rolston denied. Denial of a motion to recuse in July of 1982 is not inconsistent with acts amounting to a denial of a fair trial in August. The

---

4. Given this limitation, it may be substantially easier to prove the conspiracy to deprive than the deprivation itself.

5. At this and other points, it is worth noting that state courts have jurisdiction to hear Section 1983 cases. *Sullivan v. University Interscholastic League*, 616 S.W.2d 170 (Tex. Civ. App. 1981). The same federalism-based limitations may not be present.

distinction is between the existence of grounds for disqualification and actual demonstrated bias.

The Court, however, deems the application of collateral estoppel on issues determined by the recusal motion to be appropriate if and when the state court judgment becomes final. *See Archer v. Bill Pearl Drilling Co., Inc.*, 655 S.W. 2d 338 (Tex. Civ. App.—San Antonio 1983, writ dism.).

Conclusion

The Court is of the opinion that Defendant Ayres' Motion for Summary Judgment should be, and hereby is, GRANTED with respect to Plaintiffs' procedural due process claims and DENIED in all other respects.

SO ORDERED.

DATED: March 11, 1985.

/s/ BAREFOOT SANDERS
Barefoot Sanders
United States District Judge

APPENDIX I

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 05-82-01378-CV

HUMBLE EXPLORATION COMPANY, INC., PAT S. HOLLOWAY, STERLING PIPELINE COMPANY, FLOJO TRADING CORPORATION, HOLLOWAY EXPLORATION CORPORATION and ROBBIE HOLLOWAY,
Appellants,

v.

JANE H. BROWNING, Individually, and as Co-Independent Executrix of the Estate of WILLIAM W. BROWNING, JR., MICHAEL G. STARNES, Individually as Co-Independent Executor of the Estate of WILLIAM W. BROWNING, JR., and as Co-Trustee of the Browning Children Trusts, KATHRYN AGNES LAND STARNES, KATHRYN LOUISE BROWNING COOK, AVERILLE ADAMS BROWNING DAWSON, WILLIAM WEBB BROWNING III, WINIFRED FALLON BROWNING, and ROBERT HOLLAND BROWNING,
Appellees.

JUDGMENT

In accordance with this Court's opinion of March 26, 1985, it is hereby ORDERED that:

(1) appellees' motion to strike appellants' motion to withdraw our order dismissing the appeal is hereby GRANTED;

(2) appellees' motion to reconsider our Order of October 4, 1984, is hereby GRANTED;

(3) our Order of October 4, 1984, vacating our Judgment of July 11, 1984, is hereby SET ASIDE;

(4) our Judgment of July 11, 1984, dismissing this appeal is hereby REINSTATED;

(5) appellees' motion for issuance of a mandate is GRANTED;

(6) appellees, Jane H. Browning, Individually, and as Co-Independent Executrix of the Estate of William W. Browning, Jr., Michael G. Starnes, Individually, as Co-Independent Executor of the Estate of William W. Browning, Jr., and as Co-Trustee of the Browning Children Trusts, Kathryn Agnes Land Starnes, Kathryn Louise Browning Cook, Averille Adams Browning Dawson, William Webb Browning III, Winifred Fallon Browning, and Robert Holland Browning, recover their costs of these proceedings from appellants, Humble Exploration Company, Inc., Pat S. Holloway, Sterling Pipeline Company, Flojo Trading Corporation, Holloway Exploration Corporation, and Robbie Holloway.

March 26, 1985.

/s/ BILL J. STEPHENS
Bill J. Stephens
Justice

NO. 05-82-01378-CV

HUMBLE EXPLORATION COMPANY, ET AL.

v.

JANE H. BROWNING, ET AL.

From a District Court of Dallas County, Texas

Tuesday, July 11, 1984

BEFORE CHIEF JUSTICE GUITTARD, CHIEF JUSTICE WILLIAMS AND JUSTICE KEITH

OPINION BY JUSTICE KEITH

In this cause came on to be heard appellees' motion to dismiss the appeal and appellants' motion to abate the appeal, and the same being inspected, it is therefore considered, adjudged, and ordered that appellants' motion be overruled and the appellees' motion to dismiss the appeal is granted, and the appeal should be and the same is hereby dismissed.

It is further ordered and adjudged that the appellees, Jane H. Browning, et al have and recover of and from the appellants, Humble Exploration Company, et al and from the cash deposit in the hands of the District Clerk of Dallas County, made in lieu of an appeal bond, all costs in this behalf incurred or expended for which execution may issue, and that this decision be certified below for observance.

PUBLISH

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT
Dallas County Courthouse
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September 7, 1984

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RE: CASE NO. 05-82-01378-CV

STYLE: Humble Exploration Company, Inc., et al
v. Browning, Jane H., et al.

The appellant(s) motion for rehearing in the above styled and numbered cause has this day been OVERRULED.

Respectfully yours,

By: /s/ MELANIE KEETON
Melanie Keeton, Deputy

COURT OF APPEALS
FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS
AT DALLAS

NO. 05-82-01378-CV

HUMBLE EXPLORATION COMPANY, ET AL.,
Appellants,

v.

JANE H. BROWNING, ET AL.,
Appellees.

ORDER

It is hereby ORDERED that the motion for rehearing filed in this cause by appellants, Humble Exploration Company, et al., be and is hereby OVERRULED.

April 25, 1985.

/s/ TED M. AKIN
Ted M. Akin
Justice

FILED
FEB 14 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 85-1182

In the

Supreme Court of the United States

OCTOBER TERM, 1985

HUMBLE EXPLORATION COMPANY, INC., et al.,
Petitioners,

v.

JANE H. BROWNING, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

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February 14, 1986

ISSUE PRESENTED

Does the due process clause of the Fourteenth Amendment prohibit the courts of Texas from dismissing a pending appeal where it has been established that the appellant has taken action which, as a matter of state law, is inconsistent with the further prosecution of the appeal?

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No. 85-1182

In the

Supreme Court of the United States

OCTOBER TERM, 1985

HUMBLE EXPLORATION COMPANY, INC., et al.,
Petitioners,

v.

JANE H. BROWNING, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT

RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Jane H. Browning, et al.,[1] respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the judgment of the Texas Court of Appeals for the Fifth Supreme Judicial District in this case. That court's opinions in this case are reported at 690 S.W.2d 321 and 677 S.W.2d 111.

JURISDICTION

The Court should decline to accept jurisdiction to review the judgment of the Texas court of appeals because there

[1]The Respondents are Jane H. Browning, Individually, and as Co-Independent Executrix of the Estate of William W. Browning, Jr., Michael G. Starnes, Individually, and as Co-Independent Executor of the Estate of William W. Browning, Jr., and as Co-Trustee of the Browning Children Trusts, Catherine Agnes Land Starnes, Katherine Louise Browning Cook, Averille Adams Browning Dawson, William Web Browning, III, Winifred Fallon Browning Vaughn, and Robert Holland Browning.

is an independent and adequate state ground upon which its judgment is based. *See, Board of Supervisors of Fairfax County, Virginia, v. Allman*, 423 U.S. 940 (1975). This matter will be discussed more fully under Reasons for Denying the Writ, *infra*.

STATEMENT OF THE CASE

Petitioners seek a review of the Texas court of appeals' dismissal of their appeal for abuse of the Texas judicial system. Respondents, as plaintiffs, initiated this suit against the Petitioners in September of 1979, originally in the 193rd Judicial District Court of Dallas County, Texas. The suit alleged that Petitioner Pat S. Holloway ("Holloway"), while acting as family attorney for the Browning family and as an express trustee for the Browning children, had defrauded the late William W. Browning of Mr. Browning's ownership in Humble Exploration Company, Inc. ("Humble"), had breached fiduciary duties owed to the Browning family in various capacities, and had converted and misappropriated with malice corporate and trust assets to his own use. The suit sought actual and punitive damages and the imposition of a constructive trust, an equitable remedy under Texas law. As will be discussed *infra*, the jury found favorably to the Respondents on the ultimate fact issues.

On November 19, 1979, Respondents Holloway and Humble filed voluntary Chapter 11 bankruptcy petitions and immediately removed the 1979 case to the bankruptcy court. Holloway subsequently stated that:

> . . . [the bankruptcy] filing was a technical legal maneuver made only for the purpose of removing to the federal courts [the] lawsuit. . . .

> . . . [T]hat because of the peculiar and unusual relationship between the attorneys for [Respondents] and the state district judge where the suit was brought [Judge Hugh Snodgrass], the company's attorneys believed that a large money judgment was about to be rendered against the company without any trial or hearing of any kind on the merits of the alleged claim and the only legal way to get the case out of that judge's court was to file in the federal court under Chapter 11. (Dx.1 Settlement Hearing Statement of Facts, 487-489).

Pursuant to a subsequent agreement of the parties, the bankruptcy court remanded the case to the state court but retained authority to enforce or effectuate any resulting judgment. The agreement provided that the parties would request the presiding administrative judge to assign a retired or visiting judge to hear the cause. It also provided that the parties had full rights of appeal of the judgment in the trial court, and that upon entry of a judgment:

> The Browning Interests and/or Debtor will comply with all necessary and applicable state laws during appeal subject to [provisions detailing specific methods of posting supersedeas security depending on the possible results of the judgment].

Per the agreement, the parties requested the assignment of a retired judge to hear the case.[2] That judge granted a summary judgment for Petitioners on their defensive claim that an enforceable settlement had been reached before they

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[2]The Fifth Circuit has held that this action satisfied the provisions of the agreement for the remand. *Browning v. Navarro*, 743 F.2d. 1069 (5th Cir. 1984).

filed bankruptcy. The summary judgment was reversed on appeal and remanded for trial.[3] While a trial on the merits in this case was pending, a dispute arose between Petitioners and other working interest owners in oil and gas wells operated by Humble. When the other owners sought to take their share of the production in kind, Holloway shut-in some 151 producing oil and gas wells. The other working interest owners then filed a receivership suit in the 162nd Judicial District Court of Dallas, County, Texas, and Respondents were named as defendants due to their claims to the assets of Humble and Holloway. The judge of the 162nd district court, Judge Dee Brown Walker, appointed a temporary receiver. The receiver moved, pursuant to a mandatory Texas statute, to transfer this suit to the court in which the receivership was pending. By agreement of the sitting judges of both district courts, this case was transferred to the 162nd district court. After Judge Walker ruled against Respondents following three weeks of hearings in the receivership case and set this case for trial in early July, Petitioners filed a motion to recuse Judge Walker in the then consolidated proceedings, alleging in their motion that his impartiality might be questioned.[4] Contrary to Petitioners' statements in the petition for certiorari, their motion to recuse did not raise the issue of whether under the agreement in the bankruptcy court Judge Walker should not have heard the case because he was not a retired nor visiting judge.

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[3]*Browning v. Holloway*, 620 S.W.2d. 611 (Tex. Civ. App. — Dallas), writ ref'd n.r.e. per curiam, 626 S.W.2d. 485 (Tex. 1981). On remand, a second retired judge directed a verdict against Petitioners when they failed to prove that they had an enforceable settlement.

[4]Petitioners did not allege, as they do before this Court, that Judge Walker was corrupt. The motion to recuse and the supplemental motion to recuse are attached in the Appendix. (Appendix 4 at A-50 and 5 at A-55).

Judge Morris Rolston, a visiting judge appointed by the presiding administrative judge, conducted a two-day hearing of all the evidence Petitioners wished to present to support their motion to recuse. After hearing the evidence, Judge Rolston denied the motion to recuse Judge Walker.

Thereafter, the parties proceeded to a six and one-half week trial, which concluded with multiple jury findings adverse to Petitioners.[5] The jury found that Petitioners' conduct damaged Respondents in the amount of $70,000,000.00 and awarded an additional $2,000,000.00 punitive damages against Humble. Based upon the jury's verdict and its own additional findings, the trial court entered a judgment granting the Respondents a constructive trust over substantially all of the assets of Petitioners and damages totalling $72,000,000.00. Petitioners appealed from

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[5]Petitioners affirmatively misstate both the jury's findings and the legal effects of those findings under Texas law. Footnote 1 at page 3 of the Petition states that Judge Walker disregarded jury findings that Holloway owned "100% of the stock of Petitioners" and that Respondents' "... damage claims were barred by limitations . . . ." In special issues 2 and 9 the jury found that Holloway violated his fiduciary duties to Browning by acquiring shares of stock in Humble for his own account, and in special issues 12 and 13 found that Holloway defrauded Browning in connection with the acquisition of the stock in question. In special issue 15 the jury found that Pat Holloway and others entered into a conspiracy to defraud the Plaintiff's of their rights as shareholders in the company with malice. The only affirmative findings on limitations favorable to the Petitioners were in special issue 87 (4a & b), which related solely to special issue 12 and to no other theory of recovery. Thus, the jury did not find that Respondents' damage claims were barred by limitations. Contrary to Petitioners' statement, there was no jury finding that Pat Holloway owned any stock in Humble or Sterling Pipeline Company, Inc. Apparently, the Petitioners assert that the jury's failure to find affirmatively for a party on each theory of recovery on which he has the burden of proof is equivalent to a jury finding in favor of his adversary. Stated differently, Petitioners apparently contend that the jury's negative answers to certain special issues is an affirmative finding of the opposite fact. This simply is not the law in Texas. *C. & R. Transport, Inc. v. Campbell*, 406 S.W.2d 191 (Tex. 1966).

the judgment but did not post any supersedeas bond or security.

Because the agreement which required a supersedeas bond was not complied with, Respondents requested the Petitioners and the newly appointed bankruptcy trustee, Don Navarro,[6] to voluntarily turn over the property belonging to Respondents under the adjudged constructive trust. When the request was rejected, Respondents filed a turnover suit in the United States district court, under its bankruptcy jurisdiction, as required by the agreement, to obtain possession of their property during the pendency of the state appeal. In the turnover suit, Petitioners filed a declaratory judgment proceeding as a counterclaim, asking the United States district court to hold that the remand from the bankruptcy court was not effective, that the state courts lacked jurisdiction of the case, and, therefore, the resulting judgment before Judge Walker was void because Judge Walker was neither a retired nor visiting judge.[7] Petitioner's countercliam was but the first in a litany of collateral attacks by Holloway or his family on the validity of the judgment in this case, including a civil rights case[8], a RICO

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[6]After the jury verdict, Holloway voluntarily converted his personal bankruptcy from a Chapter 11 to a Chapter 7 proceeding, and Navarro was appointed as the trustee of his bankruptcy estate. By agreement of the parties, Navarro also was appointed the trustee over the Estate of Humble.

[7]Again Petitioners misstate the record in repeatedly referring to their position in the turnover suit as merely defensive. The filing of a counterclaim is an affirmative, not defensive action.

[8]Even prior to filing his notice of appeal in this case, Holloway filed on behalf of himself and the other Petitioners, a civil rights suit in the United States district court alleging that Petitioners were denied due process in this case by a conspiracy between Respondents, their counsel, the now "corrupt" state judge and numerous third parties to rig the trial, asking the district court to declare the judgment in this case void and enjoin its enforcement. On March 28, 1985, the district court granted

case[9], multiple collateral state attacks[10], and original pro-

summary judgment for Respondents, holding:

> Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Browning Interests. [Appendix 1 at A-3].

Thereafter, on April 18, 1985, the district court granted summary judgment for all the defendants. Holloway's appeal from the summary judgment is currently pending before the Fifth Circuit. In a separate appeal, the Fifth Circuit has already held that Judge Walker has judicial immunity. *Holloway v. Walker*, 765 F.2d 517 (5th Cir.), *cert. denied* — U.S. —, 106 S.Ct. 605 (1985).

[9]In May, 1984, Holloway, appearing as an attorney, purportedly on behalf of his daughter and various owners of royalty interests in wells operated by Humble, filed in the United States district court a RICO action against the persons who were defendants in the civil rights case. As an attorney in that case, Holloway made the same conspiracy allegations and claimed the defendants had corrupted the 162nd District Court and asked the court to declare the judgment in this case void and enjoin its enforcement. Defendants' interrogatories were answered on the basis that the plaintiffs had no personal knowledge of the allegations, the knowledge was that of their attorney, Holloway, and his knowledge was privileged as work product. The RICO suit was dismissed with prejudice pursuant to Fed.R.Civ.P. 41(b) in July, 1985.

[10]After receiving adverse rulings in the spring of 1985 in the civil rights case, the turnover suit and this case, Holloway filed two suits in June and July of 1985 in a Lee County, Texas, district court collaterally attacking the judgment in this case. The suits were practically identical except for a variation of parties. Holloway, members of his immediate family, former colleagues of Holloway, and purportedly the other Petitioners, were plaintiffs in the first Lee County suit. Holloway filed the second suit as the attorney for members of his immediate family. Both suits essentially repeated the allegations in the civil rights suit, in which summary judgment had already been rendered against Petitioners, and added numerous other allegations. Both suits asked the Lee County district court to declare the judgment in this case void, enjoin its enforcement and enjoin the Respondents from complying with the United States district court's subsequent turnover orders in the turnover suit. The Lee County court announced that it would grant a temporary injunction prohibiting the Respondents from receiving any property from the bankruptcy trustee, who in 1985 had been ordered to turn over property to the Respondents. The Lee County court did not sign such an injunction but instead entered an order declaring the judgment in this case void. The Texas Supreme Court stayed the Lee County court's order and subsequently granted a conditional mandamus directing the judge of the Lee County court to vacate his order. *Browning v. Placke*, 698 S.W.2d 362 (Tex. 1985). These Lee County cases, which were consolidated, were subsequently dismissed for lack of jurisdiction on January 10, 1986.

ceedings in the Fifth Circuit.[11]

In December, 1983, the United States district court held that Petitioners were entitled to summary judgment because Judge Walker was not a retired or visiting judge, and the resulting judgment was, therefore, void. In January, 1984, the United States district court signed a judgment for Petitioners permanently enjoining the Respondents from attempting to enforce their judgment in this case, raising doubts as to Respondents' authorization to proceed in the state appeal. Respondents appealed the United States district court's judgment to the Fifth Circuit and obtained an order from the Fifth Circuit permitting them to proceed in the state court appeal.

Respondents then filed a motion with the state court of appeals to dismiss Petitioners' state court appeal. The motion to dismiss, in summary, alleged that Petitioners had undertaken two actions which were fatally inconsistent with

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[11]In the appeal of the civil rights case now pending in the Fifth Circuit, Holloway's family and co-counsel in the Lee County cases have filed additional collateral attacks against the validity of the state court judgment in the form of original proceedings. These motions ask the Fifth Circuit *sua sponte* to declare the state court judgment void on the grounds that Holloway had a previously undisclosed diplomatic immunity from suits in Texas courts by reason of his alleged status as a Bolivian consul, that the state court judgment was obtained in an alleged violation of Holloway's civil rights and related matters. In addition, Holloway's latest wife, herself a convicted felon, in her papers to the Fifth Circuit stated that she had armed herself and threatened to do violence to anyone who attempted to enforce the turnover orders of the United States district court. Respondents' suggestion for contempt and disciplinary action based upon the making of fictitious and fraudulent claims before that court and for unethical conduct are now pending before the Fifth Circuit.

Holloway has previously attempted this pattern of collateral attacks on state court judgments in the past as an attorney. *See, Atchley v. Greenhill*, 373 F.Supp. 512 (S.D. Tex. 1974), *aff'd*, 517 F.2d 692 (5th Cir. 1975), *cert. denied*, 424 U.S. 915 (1976) (Holloway's claims of corruption by seven then sitting members of Texas Supreme Court, two of whom are now active judges on the Fifth Circuit, were dismissed by district court as frivolous).

the further prosecution of the appeal. First, Petitioners had asserted in the turnover suit in federal court as a basis for relief that the state courts had no further jursidiction of the controversy between the parties and that all judgments by all state tribunals were void as a matter of federal law. At the same time, Petitioners asserted as appellants in the state court of appeals that the state courts had jurisdiction of the case in the appeal and should render judgment in Petitioners' favor. Second, Petitioners had sought relief in another forum related to an alleged error of the trial court which was pending or could have been pending before the state court of appeals. Under Texas law, both actions are inconsistent with further prosecution of an appeal. The Texas court of appeals conducted oral argument on March 9, 1985, on Respondents' motion.[12]

During oral argument,[13] Petitioners took the following position before the Texas court of appeals:

> (1) that the state district court did not have subject matter jurisdiction of the case [Appendix 2 at A-10]; "... the only jurisdiction anyone had of this case — that is, power, inherent power, judicial power — was possessed by the bankruptcy court . . ."[A-11]; ". . . the Court, the federal court, bankruptcy court, that had jurisdiction let this matter out on a leash . . ." [A-11];

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[12]Also before the state court of appeals was Holloway's so-called "electrocution" argument. In substance, this argument was that under federal law neither the United States district court nor the bankruptcy court could review or, in effect, recall a case which had been remanded to the state court, and since the state court had violated a condition of the remand order, thereby reinstating the automatic stay applicable to bankruptcy proceedings, neither the state nor the federal courts had any jurisdiction to render any adverse judjment against Holloway's interests. Thus, the Brownings and the state courts had "electrocuted" themselves.

[13]A transcription of the arguments of Petitioners' counsel in the Texas court of appeals is contained in Appendix 2.

(2) that the bankruptcy court had the case on a string and could pull it back whenever the bankruptcy court desired [A-12];

(3) that the Petitioners had brought to the trial court's attention alleged limitation by the stipulation with regard to Judge Walker as a visiting or retired judge [A15, 16];

(4) "that the bankruptcy law . . . does not require that it [the alleged limitation of authority] be brought to the attention of the trial judge" [A-17];

(5) "the law does not require me to complain" [A-19];

(6) that the appellants' ability to obtain further relief in the state court was a "matter of state law" [A-19, 20]; that as "I understand it," the Brownings were simply seeking in the turnover suit to require Petitioners to file a supersedeas bond or surrender the assets" [A-21];

(7) that overriding all matters of state policy and everything done ". . . it's the jurisdiction of the federal court, and unless its rules are complied with then anything occurring in the state courts is a nullity . . ." [A-24];

(8) that the state court of appeals could dismiss the appeal only on the grounds there was no jurisdiction and if the state court of appeals found there was jurisdiction, Petitioners were "entitled to bring my points of error that occurred in the trial court . . ." [A-24] and that he was entitled to take this action in both places, federal court and state court at the same time. [A-25];

(9) that Judge Sanders' ruling of no jurisdiction ". . . precludes this Court from taking any action at this time . . . [and] in my view is dispositive of the 162nd District Court judgment and this appeal . . . [and] . . . this Court cannot, in my view, make any other decision . . ." [A-26].

On July 11, 1984, the Texas court of appeals dismissed the appeal concluding:

> It is difficult to foresee what other variations from state procedures the bankruptcy court may require as conditions of remand. If the "leash" theory is upheld, state court judgments in such cases would be subject to two

> types of review for procedural errors, one in the state court system according to law, and another in the federal court on grounds that need not be raised in the state court and that may be contrary to state rules of procedure. These two types of review are fundamentally inconsistent. To allow both would be to permit a party to trifle with the state court by allowing it to proceed to a judgment which he may accept or reject at will. Consequently, we hold that if a party seeks review in the federal court of a state court judgment on the ground of an alleged violation of a condition of remand from bankruptcy court without pointing out the alleged error in the state court, he is barred from further relief under state law. Having elected an inconsistent remedy in the federal court, he is confined to the relief available there. 677 S.W.2d at 114.

Petitioners filed with the Texas court of appeals a timely motion for rehearing, which was denied.

The Fifth Circuit was informed of the Texas court of appeals' dismissal of the state appeal while it considered Respondents' appeal of the United States district court's judgment in the turnover case. In its opinion reversing the United States district court, the Fifth Circuit noted that Petitioners' state appeal had been dismissed by the Texas court of appeals for trifling with the state courts and stated that it, like the state court of appeals, condemned a practice of trifling with the state courts. *Browning v. Navarro,* 743 F.2d 1069, 1082 n.33 (5th Cir. 1984).

Petitioners, upon receipt of the Fifth Circuit's opinion, had only one week left to file an application for writ of error to the Supreme Court of Texas. Instead, Petitioners filed a Motion to Withdraw Judgment with the Texas court of appeals, urging that court to exercise its "plenary power" to grant them such relief. The Texas court of appeals, acting exactly as requested in Petitioners' motion, granted an *ex parte* order purporting to vacate its July 11, 1984 judgment of dismissal and to reinstate the case. Subsequently,

Respondents filed motions with the Texas court of appeals contending that Petitioners had filed an unauthorized and untimely second motion for rehearing in conflict with mandatory time requirements of the Texas Rules of Civil Procedure and that the court of appeals did not have plenary power to act contrary to the rules of civil procedure. Respondents also asked the court to issue its mandate to the lower court on the basis that the appeal was concluded by Petitioners' failure to meet the mandatory time requirements of the rules.

On March 26, 1985, the Texas court of appeals, *en banc*, held that Petitioners' motion "was obviously wrongfully and purposely denominated and constituted nothing more than a second motion for rehearing which could not be legally filed with this court after fifteen days . . ." of the order overruling the motion for new trial as specifically mandated by Rule 21c of the Texas Rules of Civil Procedure. The court held that its plenary power did not permit it to act contrary to the rules of civil procedure. The court concluded that its order of October 4, 1984, vacating the judgment of the court of July 11, 1984, was improperly granted and should be vacated. The court also granted Respondents' motion to issue its mandate immediately.

Petitioners filed another motion for rehearing with the court of appeals, which was overruled, and filed two separate applications for writ of error to the Supreme Court of Texas. Petitioners also filed with the Supreme Court of Texas a motion for leave to file a petition for writ of mandamus to require the Texas court of appeals to vacate its mandate and to enjoin any enforcement of the judgment.[14]

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[14]Almost concurrently with the court of appeals' decision, the United States district court granted a partial judgment in the turnover suit for Respondents on April 2, 1985, in accord with its earlier opinion of March 21, 1985, holding that the Respondents were entitled to immediate

The Supreme Court of Texas denied the Petitioners' request. Subsequently, while their petitions for writ of error were pending before the Supreme Court of Texas, Petitioners filed multiple requests for the Supreme Court to order the Texas court of appeals to vacate its mandate and to enjoin Respondents from enforcing the judgment in this case. The Supreme Court of Texas did not grant any such relief. On July 3, 1985, the Supreme Court of Texas denied the application for writ of error and subsequently denied a motion for rehearing.

REASONS FOR DENYING THE WRIT

I. THERE IS AN ADEQUATE, INDEPENDENT NON-FEDERAL GROUND TO SUPPORT THE JUDGMENT.

Petitioners ask this Court to grant its writ of certiorari to review the original judgment of the Texas court of appeals dismissing their appeal in this case dated July 11, 1984. However, that judgment was vacated by the Texas court of appeals' order dated October 4, 1984.

Five months later, on March 26, 1985, the Texas court of appeals, *en banc,* set aside its order of October 4, 1984, reinstated the judgment of July 11, 1984, and directed immediate issuance of mandate. [Petitioners' Appendix I, at 117a]. The Texas court of appeals judgment of March 26, 1985, was based solely on an interpretation of the Texas Rules of Civil Procedure.[15] The Texas court of appeals held that the Petitioners filed an untimely second motion for rehearing

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possession of the property over which they had a constructive trust during the pendency of the state court appeal. Petitioners repeated requests to the Supreme Court of Texas to enjoin any enforcement of the judgment sought to prohibit compliance with the United States district court's turnover orders.

[15]Even Petitioners find no constitutional grounds to attack the March 26, 1985, judgment and supporting opinion of the Texas Court of Appeals, which rests solely on interpretation of state law.

without complying with the rules permitting proper motions for an extension of time for filing motions for rehearing. The court held that under Texas law a court of appeals could not exercise its plenary power in derogation of the strict time limitation imposed by the Texas Rules of Civil Procedure for filing motions for rehearing or requesting extensions of time for filing such motions. *Humble Exploration Company v. Browning,* 690 S.W.2d 321, 328 (Tex. App. — Dallas 1985, writ ref'd n.r.e.). [Petitioners' Appendix E, at 81a-82a].

Thus, the March 26, 1985 judgment of the Texas court of appeals is independently supported by the Petitioners' failure to observe the Texas procedural rules necessary to seek a review of the prior July 11, 1984 judgment. The Texas Supreme Court's denial of a writ of error approves that judgment of the Texas court of appeals. *See, Gammel Statesman Publishing Co. v. Ben C. Jones & Co.,* 206 S.W. 931 (Tex Comm'n App. 1918, holding approved).[16]

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[16]Petitioners ignore the March 26, 1985 judgment and supporting opinion of the Texas court of appeals. They apparently argue in a footnote that the Supreme Court's refusal to grant Respondents' motion to strike Petitioners' application for writ of error somehow overrules the Texas court of appeals' March 26, 1985 judgment and opinion. There is no basis in Texas law to support this argument. A more likely explanation for the Texas Supreme Court's orders is its intent to approve both opinions of the Texas court of appeals.

On March 26, 1985, the mandate of the Texas court of appeals issued immediately pursuant to its judgment. Despite Petitioners' repeated requests, the Supreme Court of Texas consistently refused to order the Texas court of appeals to vacate or withdraw its mandate. If the Supreme Court of Texas had determined that the March 26, 1985 opinion and judgment was incorrect as a matter of Texas law, it would have been obligated to require the court of appeals to vacate its mandate.

The Fifth Circuit in Holloway's appeal of the civil rights case has held that the federal courts must give full faith and credit to the finality of the mandate of the Texas court of appeals. *Holloway v. Walker,* Order in No. 85-1289 (5th Cir. August 12, 1985).

It is a settled rule of this Court that where the judgment of a state court rests upon two grounds, one of which is non-federal in character, its jurisdiction fails if the non-federal ground is independent of the federal ground and adequate to support the judgment. *Fox Film Corporation v. Muller,* 296 U.S. 207, 210, (1935); *Board of Supervisors of Fairfax County, Virginia, v. Allman,* 423 U.S. 940, (1975); *Minnesota v. Andrews,* 419 U.S. 881, (1974). The court of appeals' March 26, 1985 judgment, based upon Petitioners' violations of mandatory time requirements set forth in the Texas Rules of Civil Procedure,[17] rests upon separate, adequate state grounds.[18]

II. THE RECORD DOES NOT RAISE THE QUESTIONS PETITIONERS PRESENT.

In a desperate effort to attract the attention of this Court, Petitioners misstate and attempt to reconstruct the record of this case in several important instances, so as to state hypothetical questions which are not otherwise present in this case. First, Petitioners claim this record requires review of a litigant forced to trial before a corrupt and biased judge. As a corollary, Petitioners contend that this Court is obliged to accept their allegations of corruption as true, whether or not they are raised by the record. Second, Petitioners assert that the Texas courts have decided their case upon novel

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[17]Petitioners' claim that it is undisputed that they have fully complied with every procedural aspect of applicable Texas Rules of Civil Procedure is unwarranted. While Petitioners may have complied with the applicable rules in initiating their appeal, the court of appeals has found that they did not comply with the applicable rules after the court's July 11, 1984 judgment in order to preserve the same issues for subsequent appellate review.

[18]There is no contention that the Texas court of appeals made its March 26, 1985 decision in an improper attempt to deprive Petitioners of an appeal of federal issues.

and unprecedented interpretations of Texas procedure, which offend due process and, finally, that this case presents some example of unfair or disparate treatment of indigents so as to justify review. In fact, none of these issues is presented by the record in this case.

1. Petitioners' Claims of a Trial Before a Biased and Corrupt Judge.

Only after Judge Walker had ruled adversely to them in the receivership proceedings and set this case for trial did Petitioners complain about his impartiality. Even then, their motion to recuse alleged that a person might reasonably question the appearance of impartiality. There is no claim in their motions that Judge Walker was corrupted. The Petitioners' motion was heard for two days by an independent visiting judge. There is no suggestion in their brief to the court of appeals, nor even in thier petition to this Court, that they did not receive due process before Judge Rolston in the consideration of that motion.

Perhaps the best evidence of Petitioners' actual complaints in this case is found in their brief to the Texas court of appeals, pertinent portions of which are attached in the Appendix. In that brief, although they claimed that both Judge Walker and Judge Rolston had erred in failing to recuse Judge Walker, the Petitioners made no affirmative claims whatever that either judge was corrupt. [Appendix 3 at A-35-49]. This appeal was taken in 1982, and the record in this case has not changed since that time. What has happened is merely that Petitioners have substituted for the issue presented to the Texas appellate courts in this case their unsworn and unsubstantiated allegations in the civil rights case, the RICO case and the Lee County cases to the effect that they have had their property taken from them in a sham trial resulting from a conspiracy among the counsel,

the judge, and apparently even the appellate courts of Texas, as well.[19]

Recognizing that the record simply does not support this position, Petitioners assert that *Griffin v. Illinois*, 351 U.S. 12, 16 (1956), requires this Court to accept such assertions as true for the purpose of granting review. *Griffin v. Illinois* is not applicable to this case. *Griffin* involved claims of criminal defendants who alleged that there was reversible error in the trials resulting in their conviction, but they were precluded from showing any error because they could not financially afford a transcription of the trial proceedings to obtain a meaningful appeal. Under those circumstances where no record was available and the very issue under review was the necessity for a record to receive a meaningful appellate review, this Court assumed that the defendants' contentions of reversible error were true.

In this case there is a voluminous appellate record. Thus, it is not necessary to assume that Petitioners' allegations are correct without a review of that record. Moreover, both the July 11, 1984 opinion of the court of appeals and the statements by members of the court during the oral argument show that the court of appeals had extensively reviewed the record before it and was knowledgeable about Petitioners' various allegations of error. What public purpose is served by assuming allegations to be true that are shown by the record to be false?

Moreover, assuming arguendo that the *Griffin* standard would apply, the facts which this Court would then accept as

[19]Petitioners argue that in the civil rights case, the United States district court found there was competent evidence that Judge Walker and one of Respondent's counsel were engaged in a conspiracy to rig the outcome of the trial. Contrary to the impression given by Petitioners, the United States district court has made no finding that there was any conspiracy; it simply held that there was a sufficient question on " . . . an inference of a conspiratorial agreement . . ." to prevent granting summary judgment to Respondent's counsel. [Petitioners' Appendix H, at 112a.] In contrast, the United States district court did hold that the Respondents were not involved in any conspiracy claimed by Petitioners. [Appendix 1, at A-3.]

true would be the allegations of Petitioners in their brief to the Texas court of appeals and not their allegations in the civil rights case as brought forward to this Court in the petition.[20] Indeed, Petitioners do not challenge the due process of the recusal hearing before Judge Rolston at all. Thus, their suggestion that they were forced to trial before a biased judge without any opportunity for an independent review of the trial judge's impartiality is not supported by the record. Due process does not require additional review of Judge Rolston's decision.

2. Petitioners' Allegations of Novel and Unprecedented Procedural Determinations.

Petitioners' second claim that the Texas court of appeals' dismissal of their appeal was based on novel procedural grounds is totally contrary to extensive prior Texas case law and likewise is not supported in this case. The court of appeals dismissed the Petitioners' appeal because Petitioners sought two fundamentally inconsistent forms of

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[20]The court can compare Petitioners' allegations in this Petition to the claims presented to the Texas court of appeals in their brief to that court. [Appendix 3 at A-35 *et seq.*] Petitioners' claim that Judge Walker was a biased and corrupted judge follows a familiar pattern. When the suit was initially filed, Petitioners claimed that the original trial judge, Judge Snodgrass, had a "peculiar and unusual relationship" with Respondents' counsel; after Judge Walker made adverse rulings in the receivership suit, Petitioners claimed that Judge Walker lacked the appearance of impartiality; after Judge Rolston determined there were no grounds to recuse Judge Walker Petitioners claim that his decisions were contrived and improper; after Judge Walker presided in the trial resulting in a verdict against them, Petitioners alleged that Judge Walker was biased and corrupted; and now in this Court, Petitioners claim that the Texas court of appeals and, in effect, the Supreme Court of Texas, have deliberately mischaracterized the record and entered a judgment contrary to all previous Texas case law in order to preclude Petitioners from obtaining any appellate review on the merits.

Such allegations of wholesale misconduct by both trial and appellate judges are consistent with prior attacks that Holloway has made on courts that ruled against him. *See*, footnote 11, *supra*.

review in an attempt to permit them to accept or reject the judgment of the Texas courts at will. The court's holding that parties lose their right to an appeal by conduct inconsistent with their appeal was not novel.

This principle was clearly set forth over fifty years previously in *Winters Mut. Aid Ass'n Circle No. 2 v. Reddin*, 49 S.W.2d 1095, 1096 (Tex. Comm'n App. 1932) (holdings adopted), in the following language:

> The rule is well settled that, if it appears that the matters complained of in the equitable suit to vacate the original judgment could have been presented to the trial court in the original proceedings, and brought up by appeal for review, a suit in equity to vacate the judgment would not lie. This rule rests upon the principle that it is the policy of the law to avoid a multiplicity of suits. [citations omitted]. *The rule is also well established that the right to appeal or to bring error may be waived by pursuing a remedy inconsistent with an appeal or writ of error. 3 Tex.Jur. p. 159, § 100.* The foregoing rules will not be invoked in this case, unless it is shown that plaintiff in error *has pursued a remedy inconsistent with an appeal* or writ of error, and that the matters complained of in the suit in equity to set aside the original judgment could have been presented to the trial court for ruling thereon, and brought up by appeal.[21] (emphasis added).

Indeed, the compendium of Texas law, TEXAS JURISPRUDENCE, has at least since 1959 specifically cautioned, "The

[21]Petitioners suggest without analysis that *Reddin* is somehow inapplicable because the second proceedings referred to in that case involved a direct review by an equitable bill of review as opposed to the collateral attack pursued by Petitioners in this case. This distinction is unavailing. If anything, the teachings of *Reddin* apply with even greater force to collateral attacks because the Supreme Court of Texas has consistently held that the only proper method of attacking an erroneous judgment after the time for direct appeal has expired is by means of bill of review, not a collateral attack. *See, Middleton v. Murff*, 689 S.W.2d 212 (Tex. 1985).

right to appellate review may be lost by the pursuit of an inconsistent remedy," citing *Reddin*. 4 TEX.JUR.3d, *Appellate Review*, § 163, at 261 (1980); 3 TEX.JUR.2dREV., *Appeal and Error — Civil Cases*, § 195, at 597 (1959).

Petitioners' remedy in the turnover suit was inconsistent with the further right of state appeal, under *Reddin*, because: (1) Petitioners asserted in the federal court that the state courts had no jurisdiction over the case because of an alleged violation of the remand order and, thus, that all state proceedings were void, while at the same time asserting in the state courts that the state appellate court did, in fact, have jurisdiction and should proceed to adjudicate the appeal or delay its adjudication, as Petitioners might request. Obviously, these two positions and the remedies sought are at fatal variance. Either the state court has jurisdiction to proceed or it does not, and a party is entitled to but one adjudication of the validity of that contention. Second, by raising a matter which was or could have been raised in the state trial court, i.e., compliance with the conditions of remand and whether or not objection was made on this ground, Petitioners directly invaded the actual or potential jurisdiction of the state court of appeals.[22] Having originally obtained a favorable decision in the federal courts, which precluded further state review of the validity of the judgment,[23] Petitioners seek now to complain that the Texas

[22]Petitioners contended in oral argument before the state court of appeals [Appendix 2 at A-15, 16] and before this Court [Petition, at 6], that they did, in fact, raise these issues before Judge Walker in the state trial court. The state court of appeals found as a fact that they did not. 677 S.W.2d at 113. *See* discussion, *infra*. Whether Petitioners did, in fact, or could have raised the issues is not controlling. Under *Reddin*, whether the issue was or could have been, pending before the court of appeals, collateral proceedings to determine the same issue are inconsistent with the further prosecution of an appeal and are, thus, prohibited.

[23]The decision of the United States district court was entitled to immediate preclusive effect in the state courts as *res judicata* under this Court's decision in *Reed v. Allen* 286 U.S. 191 (1932). Thus, it would have been improper for the state court of appeals to have proceeded further. *See* discussion, *infra* at p. *24*.

court of appeals' correctly disposed of the case under the circumstances Petitioners presented to it.

Petitioners also contend that they enjoy an unbridled right to obtain review of the validity of state court proceedings in the lower federal courts. This Court has held to the contrary in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 482 (1983), where it held that lower federal courts possess no power whatever to sit in direct review of state court decisions.[24] The Court specifically stated:

> If the constitutional claims presented to a United States District Court are inextricably intertwined with a state court's denial in judicial proceedings of a particular [party's claim for relief], then the District Court is in essence being called upon to reveiw the state court decision. This the District Court may not do. 460 U.S. at 483-484 n. 16.

3. Petitioners' Indigency Claims.

Petitioners next imply that Texas bars appeals in civil cases to defendants who cannot provide a supersedeas bond

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[24]The issue is not one of "punishment" of Petitioners for asserting federally protected rights. Petitioners were free to make their *Kalb v. Feuerstein* 308 U.S. 433 (1940), argument before the state trial court or the state court of appeals if they wished to do so. This Court has consistently held that state courts are equally qualified to decide issues of federal law when raised in state proceedings. *Gulf Offshore Co. v. Mobil Oil Co.*, 453 U.S. 473 (1981). Here, however, the Petitioners, made a tactical choice to reduce their *Kalb v. Feuerstein* claim to judgment in the United States district court, foreclosing a state court review of the same issues. Had Petitioners attempted a similar action within the state system by filing a collateral attack in a Texas district court, the court of appeals could have dismissed the appeal or prevented actual or potential interference with its jurisdiction by the issuance of a writ of prohibition. *Taft v. Schraub*, 557 S.W.2d. 172 (Tex. Civ. App. 1977). However, state courts are without authority to enjoin the litigants from asserting whatever position they like in the federal courts. *Donovan v. City of Dallas* 377 U.S. 408 (1964). Therefore, the only action available to the Texas court of appeals was to dismiss the appeal.

set by the trial court.[25] Again, such an issue is not raised by either the court of appeals' opinion or the record.

The right of a party to appeal an adverse final judgment, whether granted by statute or state constitution, is not synonymous with any right to stay proceedings to enforce a judgment pending appeal. Texas courts, like their federal counterparts, permit a stay of proceedings to enforce the judgment when the appellant gives an approved supersedeas bond which protects the rights of the appellees to effectuate the judgment if appellant fails to reverse the judgment on appeal. *Compare* Fed.R.Civ.P. 62 with Tex.R.Civ.P. 364. A party's ability to post supersedeas is totally distinguishable from a party's ability to take an appeal. There is no suggestion in this record that Petitioners were not permitted by the Texas courts to appeal the judgment against them because they were unable to post a supersedeas. Indeed, Petitioners admit that they did, in fact, appeal, although they never posted any supersedeas bond. Thus, this issue is entirely hypothetical.[26]

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[25]In their argument, Petitioners compare themselves with impoverished criminal defendants whose poverty prevents them from taking an appeal. Petitioners were not impoverished and there is nothing in the record to indicate that lack of funds prevented Petitioners from adequately preparing their appeal in this case. Indeed, the record is voluminous and Petitioners' brief to the court of Appeals exceeded 500 pages and presented 211 points of error.

[26]Petitioners intimate that Judge Walker set the supersedeas bond at an improperly high amount to prevent the Petitioners from posting it. The record does not support this allegation. Tex.R.Civ.P. 364 provides that the amount of the supersedeas bond, with respect to money damages, shall be at least the amount of the judgment, interest and costs; when judgment is for recovery of land or other property, the bond is to pay for the value of the rent or hire of such property during the appeal in an amount estimated by the trial court. When judgment is for recovery of specific personal property, the supersedeas amount is to be fixed by the court, not less than the value of said property, on the day of judgment. The judgment awarded Respondents $72,000,000.00 damages and exten-

Moreover, even if an abstract constitutional point on indigency could be postulated in this case, Petitioners can present no such claim. Petitioners waived that claim in this case by leaving the protection of the bankruptcy court and its automatic stay for financially troubled defendants, and further by agreeing as a condition of remand to provide appropriate supersedeas protection if they lost in the state trial court. Petitioners, being dissatisfied with the agreement they reached in the bankruptcy court for remand, cannot now convert their contract difficulties into constitutional claims.

III. Petitioners Ask This Court To Redetermine a Factual Issue.

The Texas court of appeals dismissed the Petitioners' appeal because of the inconsistent review sought and obtained by Petitioners in federal court of a matter that could have been but was not presented to the state trial court. The court of appeals specifically held that it had searched the voluminous record after asking Petitioners for a specific citation and did not find the claimed objection has been properly presented or preserved.

Petitioners claim that the Texas court of appeals finding of fact regarding the record is "a mischaracterization of the record." [Petition at 6 n. 2.] Notably, Petitioners do not

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sive properties and corporate stock that Petitioners admit was worth $50,000,000.00. Pursuant to Tex.R.Civ.P. 364, the trial judge was required to set a supersedeas bond at $122,000,000.00, plus an additional reasonable amount for interest and damages. Post-judgment interest in Texas in 1982 was nine percent (9%). Even assuming that the court costs are negligible, the additional $8,000,000.00 would only cover interest for 266 days. The supersedeas bond was low, not high. Moreover, Tex.R.Civ.P. 365 authorizes the state appellate court to review the amount of a bond fixed by the trial court for excessiveness. There is no suggestion by Petitioners that they ever sought to have the amount of supersedeas bond reviewed by the state appellate courts.

favor this court with an explanation of how the Texas Court of Appeals has mischaracterized the record, or more precisely, where in the voluminous record Petitioners presented and preserved the issue. Instead they seek to have this Court review the voluminous record to determine whether it disagrees with the Texas court of appeals' finding that Petitioners failed to present properly and to preserve the alleged point of error in the state courts. This court does not grant certiorari to review evidence or to determine or discuss specific facts. *United States v. Johnston*, 268 U.S. 220, 227, (1925).

IV. The Dismissal of Petitioners' Appeal was Consistent with Policies Announced by This Court.

There are substantial policy reasons supporting the Texas court of appeals' dismissal of Petitioners' appeal under the circumstances. When Petitioners sought and obtained a judgment in the United States district court holding that the state courts had no jurisdiction of this case, this action raised significant issues of *res judicata*, comity, mootness, election of legal recourse and judicial capabilities. The United States district court's judgment in the turnover suit, which held that the state district court was without jurisdiction and the judgment in this case was unenforceable, was entitled to immediate preclusive effect under the doctrine of *res judicata* as a matter of substantive federal law. *Reed v. Allen*, 286 U.S. 191 (1932). Thus, it would be a violation of both the federal standards of *res judicata* and the doctrine of comity between state and federal courts for the Texas court of appeals to have attempted to address further the validity of the judgment. Moreover, the Texas court of appeals could not have proceeded to hear the merits of the appeal because the judgment of the United States district court had ren-

dered moot the issue of the validity of the judgment. Texas courts have no jurisdiction to render advisory opinions. *United Services Life Insurance Company v. Delaney*, 396 S.W.2d. 855 (Tex. 1965).

Finally, the necessity to utilize limited judicial resources of Texas in the most effective manner required the dismissal.[27] With the floodtide of cases burdening the courts, appellate courts cannot afford to delay consideration of appeals before them so as to permit parties to initiate collateral attacks on the judgment in other forums and pursue those proceedings to their ultimate resolution while the original appeal waits in the wings. Due process of law does not require the courts to await the pleasure of litigants on the ultimate outcome of their tactical decisions to resolve the cases on their dockets. Having already obtained a preclusive decision in their favor, Petitioners did not then seek a resolution of their state appeal by the Texas court of appeals. Instead they asked the state court of appeals to stand by indefinitely until such time, if ever, as Petitioners might desire to again avail themselves of the services of the state judiciary. Due process does not require the state appellate courts to accept such demands.

Each of these policies supported the decision of the court of appeals to dismiss the appeal when Petitioners took action inconsistent with their rights to continue that appeal. Furthermore, this Court has previously announced in a variety of situations that a person may lose his right to seek affirmative relief by abusing the judicial system. *See, Link v.*

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[27]The panel assigned to this case for the Texas court of appeals was specially appointed pursuant to a recent statutory authority. 677 S.W.2d at 111. Two members of the panel were retired appellate justices, who volunteered to continue serving the Texas judicial system. Realistically, such a panel could not be maintained indefinitely.

Wasbash R.R. Co., 370 U.S. 626 (1962) (dismissed for failure to attend pretrial conferences); *Nat'l Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639 (1976) (dismissed for failure to obey dicovery orders); *Estelle v. Dorrough*, 420 U.S. 534, *reh'g denied* 421 U.S. 921 (1975) (dismissal of appeal of prisoners who had escaped).

Indeed, in *National Union of Marine Cooks & Stewards v. Arnold*, 348 U.S. 37 (1954), the Court held that due process did not prevent a state supreme court's dismissal of an appeal because the appellant refused to deliver to a court-appointed receiver bonds which appellant owned, which were located in another state, and which were the only assets upon which the state court judgment could be collected. This Court concluded, 348 U.S. at 45:

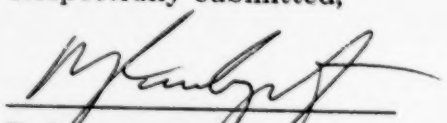
> Viewing the dismissal of petitioner's appeal in light of its reasonableness in sustaining the effectiveness of a state's judicial process, as against the rights of a judgment debtor, without filing supersedeas bond, to refuse to comply with orders safeguarding the value of that judgment, we find nothing that violates due process of law.

Here also the Petitioners sought to render the state judicial process ineffective unless it ruled in their favor. The court of appeals did not violate due process when it acted to protect the integrity of the Texas judicial system. As this Court stated in *Nat'l Hockey League*, 427 U.S. at 643, dismissal is appropriate ". . . not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

CONCLUSION

FOR THESE REASONS, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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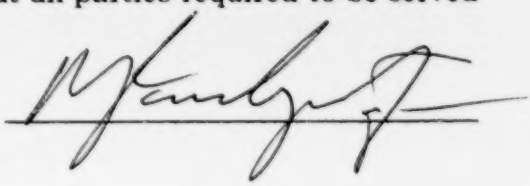
CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of February, 1986, three copies of Respondents' Brief in Opposition were mailed, postage prepaid, to both Mr. J. Bruce Bennett, of Reynolds, Allen & Cook, Incorporated, 3300 Allied Bank Plaza, Houston, Texas 77002, attorneys for Petitioners, and to Mr. Joseph Geary, Geary, Stahl & Spencer, 2800 One Main Place, Dallas, Texas 75250, counsel for Robbie Holloway. I further certify that all parties required to be served have been served.



APPENDIX

APPENDIX 1

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

Civil Action No. 3-82-1846-H

PAT S. HOLLOWAY, et al.,

Plaintiffs

v.

JUDGE DEE BROWN WALKER, et al.

Defendants

MEMORANDUM OPINION AND ORDER

This case is before the Court on Defendants The Browning Interests'[1] Motion for Summary Judgment and Motion to Dismiss, filed January 29, 1985; Plaintiffs' Response, filed February 21, 1985; and Defendants' Rejoinder, filed March 13, 1985.

Defendants have adopted the Motion for Summary Judgment of Defendant R. Jack Ayres, Jr. Rather than reproduce here the lengthy ruling on that Motion, the Court hereby incorporates the Memorandum Opinion and Order, filed March 11, 1985. The Court granted the Motion with respect to Plaintiffs' procedural due process claims, and denied it in all other respects.

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[1]Jane H. Browning, Michael G. Starnes, Catherine Agnes Land Starnes, Katherine Browning Cook, Averille Browning Dawson, William Browning III, Winifred Fallon Browning, and Robert Browning.

Defendants here argue that there is no summary judgment evidence linking them with the alleged conspiracy to deprive Plaintiffs of their constitutional right to a fair trial. They argue that they cannot be held vicariously liable for any actions of their attorneys, Defendants Kelsoe and Ayres.

Michael Starnes and Jane Browning have provided affidavits stating that they "handled all of the direction and guidance to the attorneys in [the state cases]." They avow that they had no *ex parte* contacts or communications with Judge Walker[2], and never "authorized either of our attorneys or any other party to make any improper effort to obtain Judge Walker to rule in any manner in our behalf in either the *Browning v. Holloway* case or the *Fairway Land* case". Further, they state that they "have not participated in nor have I or anyone else representing the Browning Interests authorized our attorneys or anyone to manipulate the docket, conspire with others or in any other manner attempt to improperly affect the result of either the *Browning v. Holloway* case or the *Fairway Land* case.

Plaintiffs have produced no evidence rebutting this denial. They have cited no acts allegedly committed in furtherance of the conspiracy by the Brownings. Although there certainly is a line of authority for supervisory liability under § 1983, there is no fact issue as to any improprieties in control or direction of the attorneys, *see Rizzo v. Goode*, 423 U.S. 362 (1976), personal participation, affirmative promotion of a policy which sanctions the type of action which caused the violation, *see Duchesne v. Sugerman*, 566 F.2d 817, 830-31 (2d. Cir. 1977), or violation of an explicit duty to supervise. *See Howard v. Fortenberry*, 723 F.2d 1206 (5th Cir. 1984).

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[2]Plaintiffs have presented evidence pertaining to alleged ex parte meetings involving Starnes on May 14, 1982, and Jane Browning on August 31, 1982. The May meeting, prior to the filing of the lawsuits, was in no sense improper, *see* Gillette, Weiss, Musselwhite and Ayres affidavits, filed with Defendant APP Entities' Motion, and is not relevant to the civil rights claim as defined by this Court. Jane Browning was not present at the August meeting. Nye Affidavit.

Although the Court recognizes the importance in a civil rights conspiracy action to allow a plaintiff to prove all permissible inferences from actions shrouded in secrecy, *see Ferguson v. Omnimedia, Inc.*, 469 F.2d 194, 198 (1st Cir. 1972), Plaintiffs have not, after years of discovery, produced sufficient evidence of conspiratorial agreement or conduct by the Browning Interests.

Accordingly, Defendants' Motion for Summary Judgment should be, and hereby is, GRANTED IN PART with respect to the federal claims and RESERVED with respect to the pendent state-law claims.

SO ORDERED.

DATED: March 28, 1985.

/s/ BAREFOOT SANDERS
Barefoot Sanders
United States District Judge

APPENDIX 2

No. 05-82-01378-CV

IN THE

COURT OF APPEALS

FOR THE
FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS AT DALLAS

HUMBLE EXPLORATION COMPANY, INC. et al.,
Appellants

v.

JANE H. BROWNING, et al.,
Appellees

ORAL ARGUMENT ON APPELLEES' MOTION TO DISMISS

BE IT REMEMBERED that on the 9th day of March, 1984, the above entitled cause came on for hearing in open court before a special panel appointed by the Honorable Jack Pope, Chief Justice of the Supreme Court of Texas, consisting of Chief Justice Clarence Guittard, Retired Justice Claude Williams, and Retired Justice Quentin Keith, at the Dallas County Courthouse, in the City of Dallas, County of Dallas and State of Texas, and the following proceedings were had.

APPEARANCES

MR. LOUIS P. BICKEL

Bickel & Case
4300 Thanksgiving Tower
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(214) 651-8545

Counsel for the Appellants

MR. R. JACK AYRES, JR.

R. Jack Ayres, Jr., P.C.
4350 Beltway
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(214) 991-2222

Counsel for the Appellees

ALSO PRESENT:

MR. PAT S. HOLLOWAY	*Pro Se*
MR. TIMOTHY VINEYARD	*Attorney for Don Navarro, Trustee*
MR. G. LEROY STREET	*Attorney for Robbie Holloway*

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PROCEEDINGS

CHIEF JUSTICE GUITTARD: We have another chapter in this rather extraordinary saga. The — I think probably the issue before us today is whether we dismiss the appeal or whether we abate the appeal and postpone further consideration of the case until the federal courts finally determine whether Judge Sanders' order holding the judgment appealed from here void is a valid judgment so far as the federal courts are concerned.

And since I guess the greater burden is on the party here that is asking us to dismiss the appeal, we will treat the Appellee as the moving party here and we'll hear from him first and then give him an opportunity to rebut.

Now, before we go further I'd like to say that we heretofore entered an order that all — that all matters filed before us would be filed by Mr. Bickel on behalf of all Appellants and we note here that Mr. Holloway individually has filed a motion on January 17th, which I don't think really affects what we're going to be doing here anyway, but in any event for the record we will strike that motion because it's not anything — because it's in violation of our previous order.

Now, we have this perspective on the problem. Judge Sanders' order holds that the judgment appealed from here is void because the trial court had no jurisdiction because the trial proceeded in violation of the conditions in the stipulation upon which the order of remand of the case was made from the bankruptcy court.

We have searched this record and have failed to find any indication that that matter was asserted before Judge Walker or in the trial court to any extent.

There was considerable motions and countermotions in the — at the trial court level as to whether the 162nd Court should — could properly hear the case in view of the prior pendency of the action in the 193rd Court, and this — and points were raised there and preserved here as to the propriety of the 162nd Court proceeding rather than the 193rd Court.

We understand that there was a motion made in the 162nd Court in the case which was already pending there brought by Fairway Corporation or some third party to consolidate the present case which was filed in the 193rd Court with the case filed in the 192nd (sic) Court.

And we examined the record in that case to determine whether or not there was any objection — or there was objection, but whether there was objection on the ground that — that it was — that the appeal could only be — that the case could only be heard before a retired or visiting judge under the federal court's order. We didn't find anything of that sort and, if there was some, we would like for you to direct our attention to it.

Actually, of course, the — that point didn't really affect the consolidation because whether or not the case proceeded in the 162nd Court was quite apart from the question of whether Judge Walker was qualified under the federal court's order to hear the case because, even if it were — were tried — even if it were consolidated into the 162nd Court, then of course Judge Walker, if he had acted in accordance with that stipulation, could have asked for a visiting judge to come in and try the case.

We don't find in the record any motion made before Judge Walker asking him to bring in a visiting judge for the purpose — for the reason stated in the federal court's order and the stipulation.

So, as far as we can tell — of course there was an order, there were proceedings to disqualify Judge Walker for bias and other matters, but we didn't find that this matter was ever raised in the trial court and we don't really know whether that point — we don't really think that matter was properly raised before this court.

The only point of error that purports to come anywhere near close to it is point 20 or 21 I think it is, and we looked at the argument under that point and it nowhere asserts this stipulation and that the — the trial before Judge Walker rather than before a visiting or retired judge was in — contrary to the federal court's order.

So we have an extraordinary situation to where the Appellants here have gone into the federal court and have attacked the order appealed from, for lack of jurisdiction on a ground that wasn't presented to the court in which the case was pending here.

And so the question arises as to whether by going — by not raising the matter in the trial court here and by going into the federal court and asserting it, the Appellants here have precluded themselves from any relief before this court.

Now, we also are much concerned about the effect of that — of Judge Sanders' order. It seems extraordinary to us that if the — that the federal court could send a case to the state court and prescribe the manner in which the case would be tried before the state court. We really don't think the federal courts have power to do that, and if they say that they have power to do that, as Judge Sanders has said, and that may ultimately prevail as the law in the federal courts — if that's the position of the federal courts, we are inclined to the view that the state courts ought not to accept any case remanded under those circumstances and should immediately dismiss a case which is remanded under circumstances that directs the trial court — our court — to proceed under laws that are contrary to our own laws and procedure.

Of course, if we — it would be extraordinary for us to hold that here and reverse the trial court's judgment and dismiss that when — dismiss the lawsuit on that ground, when that was never brought to the trial court's attention.

So we think that perhaps a more appropriate response to that would be to consider whether or not the Appellants' position in asserting that matter in the federal court, without having asserted it in the trial court, preceded — precludes the Appellants from any relief by way of an appeal in this court.

So I — that seems to be the issue that we have before us here, and on that issue we'll hear the arguments of counsel. Mr. Ayres?

* * *

ARGUMENT

MR. BICKEL: Gentlemen, as a given, we take the position that we could raise the question in issue of jurisdiction of the subject matter in the trial court at any time. That we can —

CHIEF JUSTICE GUITTARD: But we don't have any record before us that — that would support your argument, though. How do we do that?

MR. BICKEL: Judge, I'll talk about that issue.

CHIEF JUSTICE GUITTARD: Okay.

JUSTICE WILLIAMS: You take the position that this order directing the trial court to try before a certain kind of a judge is jurisdictional?

MR. BICKEL: Judge Williams, I'll take that up first.

CHIEF JUSTICE GUITTARD: Well now, the 162nd Court had jurisdiction of the case, of the subject matter.

MR. BICKEL: We don't think so. We don't think it did.

CHIEF JUSTICE GUITTARD: Well, apart from the question of whether it was properly in the 193rd or in the 162nd. I mean, apart from that question.

MR. BICKEL: Your Honor, apart from that and we don't think it did.

CHIEF JUSTICE GUITTARD: Now, the hundred — There wouldn't have been any problem about it.

MR. BICKEL: The requirements of the Cleveland-Ward had been met.

CHIEF JUSTICE GUITTARD: Well, I don't see any problem with Cleveland versus Ward as you do, but I mean assuming that, well, there's nothing wrong with the district — with a visiting judge under this stipulation trying the case in the 162nd since I don't think the —

MR. BICKEL: I'm a bit off guard, Judge Guittard, because I haven't reviewed the stipulation, but I think what you say is generally correct.

CHIEF JUSTICE GUITTARD: All right. Then you're in the position of saying that although the Court had jurisdiction, the trial judge was disqualified rather than the question of jurisdiction.

MR. BICKEL: No. The trial judge and court didn't have jurisdiction. See, now, this is the point I've been hanging on. I believe that the only jurisdiction anyone had of this case — that is, power, inherent power, judicial power — was possessed by the bankruptcy court. I believe that.

CHIEF JUSTICE GUITTARD: Well, then if we didn't —

MR. BICKEL: May I — Go ahead.

CHIEF JUSTICE GUITTARD: Then if we didn't have — have the power, then we're back under that insurance case and we ought not to have done anything, right?

MR. BICKEL: Wait a minute. I believe that the parties and the Court, the federal court, bankruptcy court, that had jurisdiction let this matter out on a leash.

JUSTICE KEITH: They had a string and could pull it back whenever you wanted to?

MR. BICKEL: Yes. If the Court order of remand of the federal judge —

CHIEF JUSTICE GUITTARD: Well, don't —

MR. BICKEL: — who had jurisdiction was not complied with to the letter, then he could pull it back any time he wanted to.

CHIEF JUSTICE GUITTARD: Well, under those circumstances don't you think we —

MR. BICKEL: Not pull it back, Your Honor. I think it goes back. It's automatic.

CHIEF JUSTICE GUITTARD: Don't you think under those circumstances our courts just ought not to ever assume any jurisdiction over a case that's on that kind of a leash?

MR. BICKEL: Well, that's philosophical. I mean, the parties wanted it to.

CHIEF JUSTICE GUITTARD: Well, it's not as philosophical because, if they didn't have power to do it, wasn't it your duty to call that to the trial court's attention.

MR. BICKEL: —

CHIEF JUSTICE GUITTARD: And failing that, how can you have a — how are you in a position to ask any further relief from the state of courts?

MR. BICKEL: May it please the Court. The first thing that the Browning Interests — You must bear in mind that the Fairway case was initiated in the one six two, 162nd, the receivership case, which the Brownings were made parties defendant, and a receivership was granted and that was appealed from and the Brownings filed pleadings in the Fairfield case — Fairway case I think it is — and in those pleadings they led off with a declaratory judgment action

asking Judge Walker to — Mr. Ayres is just frankly wrong about when this came to the attention of the trial court — asking Judge Walker to declare that as a matter of right, the stipulation which was affixed to the pleadings was no longer binding. And that's in your records.

JUSTICE WILLIAMS: Well, wasn't that the time that the bankruptcy judge ought to have pulled his string? Right then?

MR. BICKEL: Well, it would have been a good time, Judge, but —

JUSTICE WILLIAMS: Why didn't he?

MR. BICKEL: The reason —

JUSTICE WILLIAMS: Didn't you go back and tell him to pull the string?

MR. BICKEL: Well, I didn't — we went back and told him that we thought this was merely a contrived way to try the Browning case on the merits before the one six two, and he said, "No. What you're talking about there is the Fairway case, not the Browning case, and I'm going to issue" — There were other agreements which were with respect to —

What I'm trying to say is the Fairway case has been removed. And the federal judge said, "No, I'll tell you what. As far as I'm concerned, the Fairway case goes back to state court and I abstain from it." But that didn't affect the Browning case.

CHIEF JUSTICE GUITTARD: Well, why was it not your duty in the Browning case to call it to Judge Walker's attention that this stipulation precluded him from proceeding in the case?

MR. BICKEL: I figured I would go do it when they tried the declaratory judgment action, which I was told we were trying.

JUSTICE KEITH: You found out sooner or later in the trial in Judge Walker's court that you were trying the Browning case I think.

MR. BICKEL: Instantly, Your Honor.

CHIEF JUSTICE GUITTARD: And then —

JUSTICE KEITH: Well, did you object then?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: On what grounds?

JUSTICE KEITH: Well, you —

MR. BICKEL: On the ground that the sole jurisdiction was with Judge Harless, the 193rd Court, because that followed the stipulation.

CHIEF JUSTICE GUITTARD: All right. Then —

JUSTICE KEITH: Cleveland versus Ward. Is that your Cleveland —

MR. BICKEL: Sir?

JUSTICE KEITH: That's your Cleveland against Ward theory?

MR. BICKEL: Well, no. It's more than that.

JUSTICE KEITH: That's not —

MR. BICKEL: You understand the stipulation — Your Honor, as Your Honor will recall, it had been correctly assigned under the bankruptcy stipulation to Judge Harless, 193rd —

JUSTICE KEITH: Will your write —

MR. BICKEL: — a visiting, retired judge.

JUSTICE KEITH: Will you write a letter to the Court, just a one-page letter, as to where we can find that in the record? That you made an objection there because it violated the terms of that limited —

MR. BICKEL: I mean I've said — then I was waiting for that —

CHIEF JUSTICE GUITTARD: When did you send it?

MR. BICKEL: — to be tried in the so-called declaratory judgment action.

CHIEF JUSTICE GUITTARD: Well, when did you ever in the trial court, in any trial court, call attention to the stipulation as to its limitation with respect to Judge Walker?

MR. BICKEL: Your Honor, I think it was done for several days in May and June.

CHIEF JUSTICE GUITTARD: Well, you then —

MR. BICKEL: — as I recall —

CHIEF JUSTICE GUITTARD: Well then, you then cite it —

MR. BICKEL: — in the so-called Fairway case.

JUSTICE KEITH: We're not going to talk about the Fairway case. We don't have it up here or any part of it.

MR. BICKEL: Well, they're putting me with it, Your Honor.

CHIEF JUSTICE GUITTARD: Well, will you — The only place in your brief that you cite as a matter of record that stipulation, is in — is a citation to the exhibit attached to Mr. Ayres' pleading, that I've been able to find. That's the place that you refer to it.

MR. BICKEL: Well, there's Exhibit 89, Defendant's Exhibit 89 that's there.

CHIEF JUSTICE GUITTARD: Well, you haven't referred us to it.

MR. BICKEL: Well, it's in —

CHIEF JUSTICE GUITTARD: Well —

MR. BICKEL: — the papers we had filed I know, Your Honor.

CHIEF JUSTICE GUITTARD: Well, if you have —

MR. BICKEL: The papers we filed November 30 —

CHIEF JUSTICE GUITTARD: If you have at — If you did at any time before Judge Walker, call that to his attention, that stipulation with respect to his disqualification because of the stipulation concerning a visiting or retired judge, if you did that at any time, would you find that in the record and would you advise us?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: And it's your recollection now that you did that?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: Well —

MR. BICKEL: It's further my position, you understand, Your Honor —

CHIEF JUSTICE GUITTARD: Well, why — if you did —

MR. BICKEL: I thought —

CHIEF JUSTICE GUITTARD: Then why don't you — why didn't you in your brief refer us to that part of the record?

MR. BICKEL: Well, the only part of the record I can refer you to is to bear their, the Brownings, initation of the declaratory judgment action, bringing that very stipulation into issue, that was tried.

CHIEF JUSTICE GUITTARD: So they're the only —

MR. BICKEL: I don't know how —

CHIEF JUSTICE GUITTARD: They're the only ones that brought — that presented it there. You didn't present it at all?

MR. BICKEL: Well, as far as I was concerned I could try that issue.

CHIEF JUSTICE GUITTARD: And then —

MR. BICKEL: And when — Or, I mean, it was before the Court.

CHIEF JUSTICE GUITTARD: All right. Then we'd like for you to cite to us whenever you ever raised that in the trial court.

MR. BICKEL: Well, they raised it, and I was going to get to try it. It was on the table before the Court whether or not that stipulation would be obfuscated or not.

CHIEF JUSTICE GUITTARD: As I — as I look at the record, the only manner in which — the only occasion in which the stipulation was before the Court was in their argument as to whether they were entitled to a receivership. And there was — and —

MR. BICKEL: Fine. I mean, there it is. That's the threshold point.

CHIEF JUSTICE GUITTARD: All right. And my question is: Did you at any time point out to the judge that he had no authority to proceed because of the limitation to the stipulation limiting his authority to try it to a visiting or retired judge?

MR. BICKEL: I don't think I did just like that in the absence of the defense of the declaratory judgment —

CHIEF JUSTICE GUITTARD: Well, how did you do it?

MR. BICKEL; — and those contentions. Through defense of a declaratory judgment and those contentions. Also I think I filed a plea in abatement.

CHIEF JUSTICE GUITTARD: Well —

MR. BICKEL: I'm telling you.

CHIEF JUSTICE GUITTARD: You'll cite that for us?

MR. BICKEL: I do think — Yes, Your Honor.

CHIEF JUSTICE GUITTARD: Okay.

MR. BICKEL: And further, it is my position that the bankruptcy law, once an automatic stay is in effect — And I say the stay was in effect — does not require that it be brought to the attention of the trial judge. I say that. I contend that.

JUSTICE WILLIAMS: When you found out that Dee Brown Walker was trying this case, did you go back to the bankruptcy court and say, "Pull that string"?

MR. BICKEL: Yes.

JUSTICE WILLIAMS: You did?

MR. BICKEL: Yes.

JUSTICE WILLIAMS: What did he say?

MR. BICKEL: I didn't, but another lawyer with me went back.

JUSTICE WILLIAMS: Well, what did he say?

MR. BICKEL: They said, "It's just the Fairway case. Leave it there. Go ahead."

JUSTICE WILLIAMS: But it wasn't the Fairway case.

MR. BICKEL: That's what we tried to tell him, Judge, but they wouldn't do it.

I mean, they — Judge Gandy, the bankruptcy judge, wouldn't.

JUSTICE WILLIAMS: Is that in this record?

MR. BICKEL: It's the Fairway — I don't remember.

JUSTICE WILLIAMS: I mean the matter about the bankruptcy judge telling you to go ahead. Is that in this record?

MR. BICKEL: Yes. It's called the abstention order.

JUSTICE WILLIAMS: That's —

MR. BICKEL: I'm positive it is because I have read so much about it in these papers that are before you gentlemen at this time. Mr. Ayres argued the abstention order.

JUSTICE KEITH: You can readily see what we're trying to get at there.

MR. BICKEL: I certainly do, Your Honor.

JUSTICE KEITH: Didn't you waive your complaint that you —

MR. BICKEL: I don't see how I could.

JUSTICE KEITH: — had been making in Judge Sanders —

MR. BICKEL: That was the very point of —

JUSTICE KEITH: If you didn't complain in Judge Walker's court, you've got no business complaining here or in Judge Sanders' court.

MR. BICKEL: I'm in accord, but I did — Well, I say the law does not require me to complain because —

CHIEF JUSTICE GUITTARD: Well then if —

MR. BICKEL: — me being — It's out of the jurisdiction — or the jurisdiction being in the bankruptcy court, the proceedings outside the jurisdiction or the powers granted by that court are a nullity.

CHIEF JUSTICE GUITTARD: The law may not require you to complain, but the law very well may preclude you from any relief in the state courts unless you did.

MR. BICKEL: I'm not talking about that.

CHIEF JUSTICE GUITTARD: I say you may — that as far as the federal law —

MR. BICKEL: — whereby the judgment would be rendered if the court had no jurisdiction.

CHIEF JUSTICE GUITTARD: If so far — if the — If the federal law is that you didn't have to complain in the trial court, in the state court, in order to obtain relief from the judgment in the federal court, if that's the law as Judge Sanders apparently —

MR. BICKEL: Believed it to be.

CHIEF JUSTICE GUITTARD: — believed it to be — And we assume for the purpose of the present hearing that that is the law in the federal court — still it's a question of state law as to whether you're entitled to any — to invoke any relief in the state court by appeal or otherwise if you

didn't make that complaint before our state court. Isn't that a matter of state law?

MR. BICKEL: Yes, it's a matter of state law, but these gentlemen and Judge Walker led me to believe that that's the first thing we were going to decide, to-wit, a declaratory judgment action of whether or not they would be entitled to try this case in state court before Judge Walker despite the stipulation.

CHIEF JUSTICE GUITTARD: Now, where is that in the record?

MR. BICKEL: In their declaratory judgment action which ought to be in the transcript which is early on in the case, Your Honor.

CHIEF JUSTICE GUITTARD: Mr. Bickel, I have read that document — which I think is the document you're talking about — this morning, and I didn't find anything there except a discussion of whether the federal court's order precluded a receivership in the state court. I didn't find any reference to whether or not the judge — the visiting judge or retired judge had to try the case.

MR. BICKEL: Their pleading, Your Honor?

CHIEF JUSTICE GUITTARD: Yes.

MR. BICKEL: Then, you know, I didn't know it was coming up. It's been so long. I may be wrong about it, but my recollection was to the contrary.

CHIEF JUSTICE GUITTARD: Well, if — That's one of the things that I think perhaps you'd better look into the record on and advise us about.

MR. BICKEL: Okay.

CHIEF JUSTICE GUITTARD: Go ahead.

MR. BICKEL: If I can recall where I was, Your Honor.

CHIEF JUSTICE GUITTARD: Uh-huh.

MR. BICKEL: The — Well, I don't recall where I was. Yes. It's been mentioned that we're going to one court and asking one thing and one court for another and this, that and the other. The record ought to be clear that the judgment in federal court rendered by Judge Sanders, which is now on appeal in the Fifth Circuit came about through an action instituted by the Brownings, Mr. Ayres, and not through an action instituted by the Holloway/Humble Trustee.

In reply to the action instituted by Mr. Ayres on behalf of the Brownings the Trustee filed counterpleadings —

JUSTICE KEITH: Well, the Brownings were — Let me interrupt for a moment. The Brownings were simply seeking in it to require you to file a supersedeas bond or to surrender some assets on this judgment that was then final.

MR. BICKEL: That's as I understand it, Judge.

JUSTICE KEITH: Yes, and that's what they wanted.

MR. BICKEL: I did not file —

JUSTICE KEITH: I know.

MR. BICKEL: — I didn't handle the federal court matter and I don't know, but as I understand it, that's correct.

JUSTICE KEITH: That's the way as I remember the record.

MR. BICKEL: I think that's right.

JUSTICE KEITH: And it's your assertion that they city-slicked you some way or another. I've read enough of your pers in this case that I don't believe that you need a guardian in the courtroom.

I don't — the record shows pretty clearly there that — what I saw in there that you —

CHIEF JUSTICE GUITTARD: I —

JUSTICE KEITH: You didn't do much objecting down there in Judge Walker's court.

CHIEF JUSTICE GUITTARD: Parenthetically, we don't believe that Mr. Ayres is a simpleton either, but go ahead.

MR. BICKEL: Well, I can't remember whether I was in federal court or Judge Walker's court, but at any rate — in federal court then Holloway's counsel, Humble's counsel, countered with reference to this jurisdictional business and the upshot of it is the Sanders opinion at this time.

JUSTICE WILLIAMS: Well, you sought this relief Sanders gives, didn't you?

MR. BICKEL: Oh, yes.

JUSTICE WILLIAMS: Well now, did you ever hear of election of remedies? Isn't there something called election of remedies?

MR. BICKEL: But —

JUSTICE WILLIAMS: Do you seek for us —

MR. BICKEL: I think we've argued that last hearing, Judge Williams, and I don't believe so.

CHIEF JUSTICE GUITTARD: We argued that in the context of your federal civil rights.

JUSTICE WILLIAMS: That was before Judge Sanders' opinion.

CHIEF JUSTICE GUITTARD: And we held there wasn't any conflict between the federal civil rights suit and this case, but now this is something a little different.

MR. BICKEL: Well, you —

CHIEF JUSTICE GUITTARD: Don't you see a difference?

MR. BICKEL: I don't see a difference. I think I can contend in any forum that Judge Walker didn't have any juris-

diction and that his judgment is void and I see no inconsistencies.

CHIEF JUSTICE GUITTARD: How can a stipulation affect the jurisdiction of a court?

MR. BICKEL: Because the power, basic power of a body of politic given to anyone — in this case it starts out with the power of the bankruptcy court and it never leaves there expect under certain terms and conditions. If they're violated, then it jumps right back to the bankruptcy court.

CHIEF JUSTICE GUITTARD: And there's no federal court decision before Judge Sanders' was ever held, is there?

MR. BICKEL: I didn't hear you.

CHIEF JUSTICE GUITTARD: I said before Judge Sanders wrote, there wasn't any federal decision that ever held that.

MR. BICKEL: Well, I think — I think it's just implicit in arguing — I couldn't conceive to the contrary. If the federal court had jurisdiction, then that court's jurisdiction —

CHIEF JUSTICE GUITTARD: It could well be the rule that once the federal court has remanded they cannot attach any conditions to their remand. That could well be the law as far as the federal courts are concerned until Judge Sanders wrote. Isn't that right?

MR. BICKEL: It could be.

CHIEF JUSTICE GUITTARD: Okay. Then I have some difficulty seeing why it is so implicit.

MR. BICKEL: Well, it was improperly remanded. It never left the federal court.

If the courts of the State of Texas, because of the terms and conditions placed upon that federal court's remand, were precluded for public policy or whatever reasons, in accepting and handling the case because it interferes with their handling of their judicial business, then the case was never remanded.

CHIEF JUSTICE GUITTARD: All right. Then the case that Judge — That's what in effect Judge Sanders held, that it was the same as if the case had never remanded because it was not tried under the conditions —

MR. BICKEL: That's right.

CHIEF JUSTICE GUITTARD: — of the remand.

MR. BICKEL: That's right.

CHIEF JUSTICE GUITTARD: But then that doesn't affect our question as to whether or not you are entitled to any further relief in the state court if you didn't raise that timely in the state court.

MR. BICKEL: Well, I said overriding everything done, it's the jurisdiction of the federal court, and unless its rules are complied with then anything occurring in state courts is a nullity.

CHIEF JUSTICE GUITTARD: Well, we bow to that. We bow to that.

MR. BICKEL: And so I can't —

CHIEF JUSTICE GUITTARD: We'll bow to that, but the question is whether you are entitled to proceed with this appeal or whether we should dismiss it.

MR. BICKEL: Certainly.

CHIEF JUSTICE GUITTARD: And that's not a question the federal court —

MR. BICKEL: Well, certainly if you conclude that — Well, I'm challenging jurisdiction now in the state courts.

CHIEF JUSTICE GUITTARD: Well, then why shouldn't we dimiss the appeal?

MR. BICKEL: If you believe — You can only dismiss it on the grounds that there's no jurisdiction. If you find there is jurisdiction, then I'm entitled to bring my points of error that occurred in the trial court, Your Honor.

JUSTICE KEITH: In both places, federal court and state court at the same time?

MR. BICKEL: Yes.

JUSTICE KEITH: Isn't there an election of remedies doctrine?

MR. BICKEL: I don't believe so. I think you can take — In fact, to contend differently in a different court would be madness, on a point of jurisdiction and who's got the power. We, of course, contend consistently in both courts.

CHIEF JUSTICE GUITTARD: You're asking us in this case to reverse the judgment of the trial court, right?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: You're not asking us to dismiss our appeal?

MR. BICKEL: Yes.

CHIEF JUSTICE GUITTARD: You are?

MR. BICKEL: Both.

CHIEF JUSTICE GUITTARD: The case — the appeal is dismissed. That leaves then the order of the trial court in force. If you're asking us to dismiss —

MR. BICKEL: No. I, I, I —

CHIEF JUSTICE GUITTARD: If you're asking us to dismiss the appeal, we'll do it right today.

MR. BICKEL: Your Honor, I ask you to dismiss only on a finding that there's no jurisdiction in the 162nd and thereby in accordance with the Appellate review language send it to the trial court with instructions to dismiss for want of jurisdiction.

CHIEF JUSTICE GUITTARD: That's not dismissal of appeal. That's a reversal.

MR. BICKEL: Well, I didn't — I didn't — I had not intended to convey the idea that I wanted a dismissal to anybody.

CHIEF JUSTICE GUITTARD: All right. If you don't want to dismiss this appeal — I didn't think you wanted a dismissal of the appeal. I just wanted to make you sure you understood what you were asking for if you did — if you said that you wanted one.

MR. BICKEL: I'm trying not to say I want a dismissal.

CHIEF JUSTICE GUITTARD: Okay. Now, is there anything further, Mr. Bickel?

MR. BICKEL: I would merely want to point out that in my view I think that the Sanders ruling of no jurisdiction of Walker precludes this Court taking any action at this time. Because if that decision is upheld, that decision of Judge Sanders — the voidness of the Walker order — is upheld, that in my view is dispositive of the 162nd District Court judgment and this appeal.

So I will ask the Court to stay and do nothing. If this Court believes that the 162nd District Court did not have jurisdiction of the matters for — I will call it the state court reason as distinguished from federal jurisdictional reason — then this Court could remand this case to the 162nd directing that it dismiss the — its judgment.

However, this Court cannot, in my view, make any other decision, because to do so not knowing whether or not the federal court's decision will be reversed or upheld, bringing about — and I probably hear it constantly, and the parties may — they ultimately may be entitled to it as far as the Court is concerned.

We're entitled to appeal if the 162nd District Court in fact is to have jurisdiction of the matter. And we're entitled to dismissal of the 162nd Court, trial court judgment for want of jurisdiction —

CHIEF JUSTICE GUITTARD: You can't dismiss a judgment.

MR. BICKEL: Now wait a minute.

CHIEF JUSTICE GUITTARD: You can't dismiss a judgment. You either reverse a judgment or affirm a judgment. You dismiss a cause.

MR. BICKEL: Well, dismiss a cause.

CHIEF JUSTICE GUITTARD: Okay.

MR. BICKEL: So in the event that the Fifth Circuit upholds the Sanders' decision, United States Supreme Court either upholds it or grants certiorari.

JUSTICE WILLIAMS: Did the Fifth Circuit set this for hearing?

MR. BICKEL: Not that I know of, Your Honor. In fact, I don't think that the Humble/Holloway briefs are due until Monday or Tuesday or Wednesday or something like that.

CHIEF JUSTICE GUITTARD: Anything further?

MR. BICKEL: No, sir.

* * *

APPENDIX 3

NO. 05-82-01378-CV

IN THE COURT OF APPEALS
FOR THE FIFTH SUPREME JUDICIAL DISTRICT
OF TEXAS
AT DALLAS

HUMBLE EXPLORATION COMPANY, INC., et al.,
Appellants

vs.

JANE H. BROWNING, et al.,
Appellees

Appealed From The District Courts of
Dallas County, Texas

193rd Judicial District Court
(with Honorable Fred Harless, presiding)
VOLUME ONE

Judgment After Trial
May 3-May 12, 1982

162nd Judicial District Court
(with Honorable Dee Brown Walker, presiding)
VOLUMES TWO
AND THREE

Judgment After Trial
July 6-August 20, 1982

BRIEF FOR APPELLANTS
VOLUME TWO

BICKEL & CASE
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POINT OF ERROR NO. 15 (RESTATED)

THE JUDGMENT SIGNED AUGUST 26, 1982 AND ALL PRIOR PROCEEDINGS THEREUNDER ARE VOID AND SHOULD BE SET ASIDE BECAUSE THE 162ND JUDICIAL DISTRICT COURT LACKED SUBJECT MATTER JURISDICTION. (Tr. 1421).

POINT OF ERROR NO. 16 (RESTATED)

THE TRIAL COURT LACKED JURISDICTION TO ALLOW THE BROWNINGS TO SEEK ANY RELIEF IN THE 162ND JUDICIAL DISTRICT COURT BECAUSE TO DO SO VIOLATED THE EXPRESS TERMS OF THE "STIPULATION AND AGREEMENT ON MANNER IN WHICH CONTROVERSY SHALL BE HEARD, DETERMINED AND LIQUIDATED." (Tr. 864 at 878).

POINT OF ERROR NO. 17 (RESTATED)

THE TRIAL COURT LACKED JURISDICTION TO GRANT THE BROWNINGS AN IMMEDIATE DECLARATORY JUDGMENT BECAUSE APPELLANTS WERE ENTITLED TO A JURY TRIAL AFTER DEMANDING SAME. (Rec.S.F. 1065) (Tr. 1045).

POINT OF ERROR NO. 18 (RESTATED)

THE TRIAL COURT ERRED IN GRANTING THE BROWNINGS' APPLICATION FOR IMMEDIATE DECLARATORY JUDGMENT BECAUSE THE TEXAS DECLARATORY JUDGMENT ACT CANNOT BE USED TO CONSTRUE A COURT ORDER.

POINT OF ERROR NO. 19 (RESTATED)

THE TRIAL COURT ERRED IN ALLOWING EXPEDITED AND SUBSTITUTED SERVICE OF PROCESS ON "CROSS-DEFENDANTS AND THIRD-PARTY DEFENDANTS" BECAUSE IT VIOLATED TEX.R.CIV.P. 106 AND 695.

ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR NO. 15 THROUGH 19

A threshold issue of the appeal of the August 26 judgment is whether the 162nd Judicial District Court had subject matter jurisdiction of the Brownings' cause of action. The determination of the fundamental validity of the trial court's proceedings lies in the Stipulation and Agreement of January 17, 1980, approved by the Bankruptcy Court. (Tr. 878). The Stipulation clearly states the Brownings agreed to litigate their claims against Appellants before a specific retired or visiting judge agreed upon by both sides in the 193rd Judicial District Court and further that the Brownings would not seek a receivership or injunction.

In disregard of the Stipulation, the Brownings filed a declaratory judgment action in the 162nd Judicial District Court to construe and avoid the Stipulation. Such action necessarily involves construction of the Bankruptcy Court's Order of Abstention of June 4 which provides, in part: "... that this Court abstains in favor of the *courts* of the State of Texas with regard to the litigation now pending as Cause No. 82-5742-I in the 162nd District Court ..." (Tr. 864, emphasis added). Appellants objected to the trial court's assuming jurisdiction to construe this Bankruptcy Court Order, because among other reasons such order related to the Fairway claims then pending in the 162nd Judicial District Court, *at a time when the Brownings' cause was not before the 162nd Judicial District Court.* (Rec.S.F. 822). To the contrary, their identical cause of action was pending in the 193rd Judicial District Court as stated in their pleadings. (Tr. 864). Counsel for the Brownings stated: "I represent to the Court that that Order expressly vests this Court with jurisdiction ..." (Rec.S.F. 822).

Thus, the Brownings improperly utilized the Declaratory Judgment Act for purposes of asking the trial court to interpret an Order of the Bankruptcy Court, constituting reversible error. *Speaker v. Lawler,* 463 S.W.2d 741 (Tex.Civ.App. - Beaumont 1971, writ ref'd, n.r.e.).

In *Speaker*, the court held:

> "We have concluded that a litigant cannot use Article 2524-1 for the purpose of asking a trial court to interpret a prior judgment entered by that or another court. We feel the approval of such a procedure would literally open "Pandora's Box" and permit, among other things, a new type of re-trial of the same issues or a new method of review of the prior judgment."

When the trial court does not have jurisdiction to act, the proper practice for the appellate court is not to dismiss the appeal but to reverse the trial court's order, and remand the cause with the direction that it be dismissed. *Martin v. Commercial Standard Fire & Marine Ins. Co.*, 505 S.W.2d 799 (Tex. 1971); *Fruit Dispatch Co. v. Rainey*, 111 Tex. 266, 232 S.W. 281, 282 (1921); TEX.R.CIV.P. 434.

"The declaratory judgment action cannot be invoked for the determination of procedural rules or rights . . . in a pending suit. The reason . . . is that such questions should be determined by the Court in which such action is pending or is to be filed." *Railroad Commission v. Houston Natural Gas Corp.*, 186 S.W.2d 117, 124 (Tex.Civ.App. — Austin 1945, writ ref'd w.o.m.).

The Order resulting from the declaratory judgment suit recites forty-seven findings of fact and conclusions of law as to the merits of the Brownings' action as well as the merits of the underlying constructive trust case. (Tr. 1045). There is a fundamental question of jurisdiction of the 162nd Judicial District Court to entertain the declaratory judgment claims of the Brownings, thus testing the validity of the entire proceedings. In response to the initiation of these claims, Appellants immediately filed Pleas in Abatement raising the subject matter jurisdiction of the trial court. (Tr. 763, 900, 984, 1109) (argued under Point of Error No. 10). Appellants' pleadings alleged and established that the Brownings' identical cause of action was pending in the

193rd Judicial District Court with Judge Harless presiding, and set for jury trial in September, 1982. (Set.S.F. 1771). The pleas were summarily overruled (Tr. 336, 338) in direct contravention of Texas law, rendering the trial court's subsequent orders void. *Curtis v. Gibbs,* 511 S.W.2d 263 (Tex. 1974); *Cleveland v. Ward,* 116 Tex. 1, 285 S.W. 1063 (1926); *Conn v. Campbell,* 245 S.W.2d 813 (Tex. Comm'n App. 1930, opin. adopted).

In *Continental Oil Co. v. P.P.G. Industries,* 504 S.W.2d 616 (Tex.Civ.App. - Houston [1st Dist.] 1973, writ ref'd, n.r.e.), the court was presented with a plea in abatement in response to a declaratory judgment action. The Houston court quoted the applicable rule found in *Texas Liquor Control Board v. Canyon Creek Land Corp.,* 456 S.W.2d 891 (Tex. 1970):

> " . . . As a general rule, an action for declaratory judgment will not be entertained if there is pending at the same time it is filed, another action or proceeding between the same parties and in which may be adjudicated the issues involved in the declaratory action . . . "

Therefore, the right of the Brownings to seek relief in the 162nd Judicial District Court constituted the adjudication of the merits of a declaratory action by a court without jurisdiction.

When the trial court improperly assumed jurisdiction, Appellants immediately demanded a jury trial of the fact issues and paid a jury fee. (S.F. 943, 1061-4). The trial court refused their jury demand, which rendered any further proceedings invalid. TEX.CONST. art. I, §15; art. V, §10. Our Supreme Court has held that the mere denial of the constitutionally protected right to trial by jury raises an inference of probable harm under both Rules 434 and 504 so as to require reversal of the trial court's judgment. *Texas Pacific Railway Company v. Van Zandt,* 317 S.W.2d 528, 531 (Tex. 1958).

The law is clear that the right to a jury trial exists in proceedings under the Declaratory Judgment Act. *Continental Oil Company v. P.P.G. Industries,* 504 S.W.2d 616 (Tex.Civ.App. - Houston [1st Dist.] 1973, writ ref'd, n.r.e.), *Hatten v. City of Houston,* 373 S.W.2d 525 (Tex.Civ.App. - Houston 1963, writ ref'd, n.r.e.). The Uniform Declaratory Judgment Act, TEX.REV.CIV.STAT.ANN.Art, 2524-1, Section 9 provides:

> "When a proceeding under this Act involves the determination of an issue of fact, such issue may be tried and determined in the same manner as issues of fact are tried and determined in other civil actions in the Court in which the proceeding is pending."

Consequently, the trial court erred as a matter of law in assuming jurisdiction to: construe the June 4 Order of the Bankruptcy Court (Tr. 1399); to interpret the Brownings' rights under the Stipulation and Agreement, approved by Order of the Bankruptcy Court (Tr. 864 at 878); and further committed reversible error in refusing Appellants' jury demand. (S.F. 943).

The trial court also erred in entering judgment on the merits of the declaratory judgment action in a temporary hearing. (Tr. 344). This procedure has been declared improper by the Supreme Court of Texas. *Houston Belt & T. Ry. Co. v. Texas & New Orleans R. Co.,* 289 S.W.2d 217 (Tex. 1956). In *Houston Belt,* declaratory judgment claims were presented and ruled upon in a hearing for temporary injunction. The construction of a prior contract between the litigants was a threshold issue, as in the case at bar. Proper objections were made that the court was without authority to convert the hearing into a trial on the merits. The question in the case *sub judice* is the court's jurisdiction to act *before* a trial on the merits of the constructive trust case could be had.

A court "will not grant declaratory judgment if the same issues between the same parties (are) involved in another cause pending at the time of the filing of the declaratory

proceedings." *Pickens v. Hidalgo County Water Control & Improvement District,* 284 S.W.2d 784 (Tex.Civ.App. — San Antonio 1955, no writ). Furthermore, when a plaintiff's cause of action might be enforced by seeking direct relief, declaratory judgment is improper. *Southern Traffic Bureau v. Thompson,* 232 S.W.2d 742, 750 (Tex.Civ.App — San Antonio 1950, writ ref'd n.r.e.).

Our courts are not authorized to enter declaratory judgments unless it ends the controversy. *Joseph v. City of Ranger,* 188 S.W.2d 1013 (Tex.Civ.App. — Eastland 1945, writ ref'd w.o.m.). Of course, this did not occur in the case at bar. The Brownings' use of the declaratory judgment action was to determine if they were properly in Judge Walker's court, and if they could proceed for extraordinary relief and a trial. (Tr. 864).

Therefore, Judge Walker committed reversible error in improperly ruling on the Brownings' claims as to their right to seek any relief in the 162nd Judicial District Court. The Brownings' claims were unliquidated and based upon theories of constructive trust which were set for trial in the 193rd court, the court of dominant and exclusive jurisdiction.

Service of Process

The manner of service on all cross-defendants and third party defendants constituted an abuse of TEX.R.CIV.P. 106(b) and TEX.R.CIV.P. 695. Rule 106(b) provides:

> "The court may authorize service . . . in any other manner that the affidavit or other evidence before the court shows will be reasonably effective to give the defendant notice of the suit."

In order to utilize this provision of Rule 106, a strict compliance thereof is required. The Brownings did not establish that personal service upon any cross-defendants or third party defendants was impracticable as required by law.

Stylemark Construction, Inc. v. Spies, 612 S.W.2d 654 (Tex.Civ.App. - Houston [1st Dist.] 1981, no writ).

The trial court further erred in allowing the Brownings to serve various cross-defendants and third party defendants by serving attorneys for Humble. Absent the defendant's explicit authorization for an attorney to accept service, the trial court does not gain personal jurisdiction over the defendant. *H. L. McRae Co. v. Hooker Construction Co.,* 579 S.W.2d 62 (Tex.Civ.App. - Austin 1979, no writ). Humble's counsel objected to this manner of service and refused to accept service of process (Rec.S.F. 842). The trial court has no discretion to authorize later a mode of service not authorized when made. *Grasz v. Grasz,* 608 S.W.2d 356 (Tex.Civ.App. - Dallas 1980, no writ). Having wholly failed to comply with the mandatory requirements of substituted service, the trial court acquired no personal jurisdiction over the parties which would constitute the required statutory three days' notice to defendants, pursuant to TEX.R.CIV.P. 695.

In summary, the trial court erred in:

(1) assuming jurisdiction to construe an Order of the United States Bankruptcy Court; (Tr. 1045, 864 at 878);

(2) entertaining and granting a declaratory judgment action, without a jury trial or a non-jury trial of the merits of such action; (Tr. 1045);

(3) converting a temporary hearing into a trial on the merits of a declaratory judgment, to determine if the court had jurisdiction.

Because the trial court lacked jurisdiction of the matter, the August 26 Judgment should be reversed and remanded with instructions to dismiss the Brownings' suit.

POINT OF ERROR NO. 20 (RESTATED)

JUDGE WALKER ERRED AS A MATTER OF LAW IN FAILING TO RECUSE HIMSELF.

POINT OF ERROR NO. 21 (RESTATED)

JUDGE WALKER ERRED IN RULING UPON APPELLANTS' MOTION TO RECUSE AND INCLUDING WITHIN THE ORDER OF REFERRAL AN ADMONITORY INSTRUCTION.

POINT OF ERROR NO. 22 (RESTATED)

THE TRIAL COURT, JUDGE MORRIS ROLSTON PRESIDING, ERRED AS A MATTER OF LAW IN OVERRULING APPELLANT'S MOTION TO RECUSE.

POINT OF ERROR NO. 23 (RESTATED)

THE FAILURE BY JUDGE WALKER TO RECUSE HIMSELF OPERATED TO DEPRIVE APPELLANTS OF PROCEDURAL DUE PROCESS, AS GUARANTEED BY THE CONSTITUTIONS OF THE STATE OF TEXAS AND OF THE UNITED STATES.

POINT OF ERROR NO. 24 (RESTATED)

THE FAILURE BY THE TRIAL COURT TO GRANT THE MOTION TO RECUSE OPERATED TO DEPRIVE APPELLANTS OF PROCEDURAL DUE PROCESS, AS GUARANTEED BY THE CONSTITUTIONS OF THE STATE OF TEXAS AND OF THE UNITED STATES.

ARGUMENT AND AUTHORITIES UNDER POINTS OF ERROR 20 - 24

On June 25, 1982, Appellant filed, pursuant to Rule 18a of the Texas Rules of Civil Procedure, a motion wherein Appellants requested Judge Walker to recuse himself or to refer the motion pursuant to said rule and TEX.REV.CIV.STAT. Art. 200(a) (Tr. 1098). The motion was founded on Appellants' rights under the constitution and laws of the United States and of the State of Texas to have their case heard and adjudicated by a fair and impartial judge in a manner consistent with the requirements of

procedural due process and the canons of the Code of Judicial Conduct. Appellants specifically urged in their motion that, in the instant case, the impartiality of Judge Walker might reasonably be questioned on grounds including his initiating and entertaining numerous *ex parte* conferences with opposing counsel, his apparent pre-judgment of material fact issues in the case on the basis of *ex parte* communications, his entry of numerous orders in complete derogation of Appellants' rights to procedural due process, and his past and present relationship with opposing counsel, certain of whom had a financial interest in the lawsuit.

Notwithstanding the explicit directives contained in Rule 18(a), on January 28, 1983, rather than recuse himself or refer the case for hearing, Judge Walker entered an order reciting consideration of the motion and expressly ruling that the motion was without merit (Tr. 1135). The order further directed referral to the presiding judge with the admonition that: "a portion of this cause is set for trial on its merits for July 6, 1982." (Tr. 1135 LL 17-18).

Judge Morris Rolston was subsequently assigned to hear the motion, which was set for hearing on July 1, 1982.[1]

At the hearing, Appellants introduced evidence, which as described hereinafter was largely undisputed, showing: (i) that up to the time of hearing, Judge Walker had followed a consistent pattern of entering orders without notice to Appellants and without hearing; (ii) that certain of these orders followed or grew out of admitted ex parte communications; (iii) that the trial court held on a daily basis *ex parte* conferences with opposing counsel, and in particular, with counsel for the Brownings; (iv) that the Court had conducted an extra-judicial investigation of material facts in

[1]It is not apparant from the Transcript or Statement of Facts who set the matter for hearing. Judge Rolston operated throughout the hearing on the misconception, likely gained from Judge Walker's admonitory instruction, that he necessarily had to rule prior to the July 6, 1982 setting. (S.F. 124-125; 138 *11* 2-4).

dispute between the parties pending before it; and (v) that Judge Walker had been represented in his individual and judicial capacity on numerous occasions by counsel for the Brownings and by counsel for certain of the other opposing parties.

Appellants attempted to introduce evidence on the close business and personal relationship between and among the judge, counsel for the Brownings, the receiver, counsel for the receiver, and certain of the counsel for Participants, arising, in part, from their joint tenure on the County Law Library Committee and, upon Judge Walker's resignation therefrom, from their formation and operation of the Dallas County Bar Association. This evidence was improperly excluded by the trial court on the grounds that it was immaterial. (S.F. 207).[2]

Immediately upon completion of the testimony, the trial court ruled from the bench and, as a matter of law, denied the motion. (Recusal S.F. 166 *11* 13-14; Tr. 1155). Although proper request was made therefor (Tr. 1231), the trial court declined to enter findings of fact or conclusions of law.

Appellants submit, that for the reasons set forth hereinafter, Judge Walker erred as a matter of law in ruling upon the motion and in failing to recuse himself *instanter* and that the trial court assigned to hear the motion applied the wrong standard in ruling upon it and erred in denying it. Appellants further submit that said actions of the trial court, acting through Judge Walker and through Judge Morris Rolston, operated to deprive Appellants of their rights to procedural due process, as guaranteed by the Constitution of the United States and of the State of Texas.

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[2]From July 1-2, 1982 hearing on Motion to Recuse. Hereafter references to the Statement of Facts from the hearing will be designated "Recusal S.F. ___".

I.

JUDGE WALKER ERRED AS A MATTER OF LAW IN CONSIDERING AND OVERRULING APPELLANTS' MOTION TO RECUSE.

Rule 18a(c) of the Texas Rules of Civil Procedure provides that after the filing of a motion to recuse and prior to any further proceedings in the case: "the judge shall either recuse himself or request the presiding judge of the administrative judicial district to assign a judge to hear such motion."

Rule 18a(d) in turn provides, in relevant part, that: "if the judge declines to recuse himself, he shall forward to the presiding judge of the administrative judicial district, in either original form or certified copy an order of referral, the motion and all opposing and concurring statements. Except for good cause stated in the order in which further action is taken, the judge shall make no further orders and *shall take no further action* in the case after filing of the motion and *prior to a hearing on the motion.*" (emphasis added). Thus, under the express provision of the rule, the judge must either recuse himself *instanter* or refer the case. In the case at bar, Judge Walker did neither; rather, he entered an order, citing consideration of the motion and expressly ruling it to be "without merit." Judge Walker further included within his order an admonitory instruction that the case was pending on July 6, 1982. Appellants submit that Rule 18a permits the court but one of two actions; either to recuse himself or to refer the case for hearing by the presiding judge or his designee. The rule is clearly and precisely tailored to avoid the very circumstance presented herein, namely the prejudice that may result from a "preruling" on the motion by the judge made subject thereto.

II.

BOTH THE CONSTITUTION OF THE UNITED STATES AND THAT OF THE STATE OF TEXAS DICTATE THAT A COURT SHALL RECUSE HIMSELF IN ANY CASE WHEREIN HIS IMPARTIALITY MIGHT REASONABLY BE QUESTIONED.

Prior to the effective date of the Code of Judicial Conduct on September 1, 1974, the grounds for disqualification of

judges in Texas were limited to the three grounds prescribed in Sections 11 of Acticle 5 of the Texas Constitution, in Article 15 of the Texas Civil Statutes, and in Article 30.01 of the Texas Code of Criminal Procedure. The stated grounds dictated disqualification in instances in which the judge had: (1) an interest in the case, (2) a prohibited relationship to a party; or (3) acted as counsel in the case. Under these provisions, which were held to be both inclusive and exclusive, *Chilicote Land Company v. Houston Citizens Bank and Trust Company*, 525 S.W.2d 941 (Tex. Civ. App. - El Paso 1975, no writ), neither bias nor the appearance of bias was a ground for disqualification.

However, under the due process clause of the United States Constitution, the United States Supreme Court had developed, as a matter of procedural due process, a body of law which dictated a stricter and higher standard than that required by the various state constitutions, statutes and decisions. The Supreme Court held that due process dictates that: "justice must satisfy the appearance of justice," *Offutt v. United States*, 348 U.S. 11, 14. In *Tumey v. Ohio*, 273 U.S. 510, 532, the United States Supreme Court prescribed that "every procedure which would offer a possible temptation to the average man as judge . . . not to hold the balance nice, clean and true between the State and the accused, denies the latter due process of law." In *In re Murchison*, 349 U.S. 133 (1955), the Supreme Court stated that "such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice between contending parties."

In view of the Supreme Court's pronouncements on the requirements of due process, the Texas Supreme Court in 1974 promulgated the Code of Judicial Conduct, and in the same year Congress enacted 28 U.S.C. § 455(a). Both Canon 3c of the Texas Code of Judicial Conduct and 28 U.S.C. § 455(a) require, in identical language, the disqualification of a judge in any "proceeding in which his *impartiality might reasonably be questioned* . . ." (Emphasis added).

Canon 3C of the Code of Judicial Conduct provides, in relevant part, as follows:

> "C. Disqualification (Art. B, Sec. 11, Texas Constitution; Art. 15 V.A.T.S.; C.C.P. art. 30.01).
>
> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where:
>
> (a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding; . . .
>
> (c) he knows that he . . . has . . . (an) interest that could be substantially affected by the outcome of the proceeding."

In *McLeod v. Harris*, 582 S.W.2d 772 (Tex. 1979), the Texas Supreme Court pointed out that Article 5, Section 11 of the Texas Constitution, relating to disqualification, has been "implemented" by Canon 3C of the Code of Judicial Conduct. The Court further ruled that mandamus lies to enforce compliance with Tex.Rev.Civ.Stat., Art. 200a(6), which provides, in relevant part, that "a district judge shall request the presiding judge to assign a judge of the administrative district to hear any motions to recuse such district judge from a case pending in his court." Thus, the Texas Supreme Court clearly indicated the applicability of Canon 3C of the Code of Judicial Conduct as a measure by which to judge the necessity for recusal.

In *Shapley v. Texas Department of Human Resources*, 581 S.W.2d. 250 (Tex.Civ.App. — El Paso 1979), the court stated as follows:

> "Prior to the effective date of the Code of Judicial Conduct on September 1, 1974, the grounds enumerated by the Constitution were held to be both inclusive and exclusive and mere bias and prejudice were not disabling factors. (case cited). *Now under the code, the subject of a disqualification has been broadened and the direction has been made that a judge should disqualify*

himself in a proceeding in which his impartiality might reasonably be questioned." (emphasis added).

Similarly, in *Robb v. Robb,* 605 S.W.2d 391 (Tex.Civ.App. — El Paso 1980, no writ), the court, after discussing several earlier decisions holding that the limited grounds for disqualification specified in the Texas Constitution were both "inclusive and exclusive" and that "mere prejudice and bias are excluded as a disabling factor" recognized that: "All of this has now been changed by the Supreme Court's decision in *McLeod v. Harris.*" While expressing some discomfiture with the expansion of the grounds for recusal, the court in *Robb* expressly held that it was bound by the decision of the Supreme Court.

In *Manges v. Garcia,* 616 S.W.2d 380 (Tex.Civ.App. — San Antonio 1981, no writ), the court rejected the "duty to sit" concept of older cases which held that unless the judge was disqualified under one of the three grounds specified in Section 11 of Article 5 of the Constitution, he could not be disqualified and had a duty to sit. The court stated:

> "Canon 3C (1)(a) of the Code of Judicial Conduct provides that a judge should disqualify himself in a proceeding in which his impartiality 'might reasonably be questioned' if 'he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.'
>
> "It is clear that Canon 3C (1)(a) contemplates that a judge's refusal to sit may be based on a reason not included in the disqualifying grounds enumerated in the Constitution, and it is this expansion of the Constitutional statement of disqualifying factors which was condemned in *Robb* as an amendment of the Constitution by a judicial fiat."

The court goes on to point out as follows:

> "One of the hallmarks of our system of justice is the constant attempt to prevent even the probability of unfairness. To attain this goal the courts have identified various circumstances which point to the conclu-

> sion that the possibility of actual bias of the adjudicator is too high to be constitutionally tolerable. The application of this principle is not limited to cases in which the decision maker has an 'interest' in the result. It is applicable to cases where the judge has been the target of personal abuse or criticism from the party before him." Withrow v. Larkin, 421 U.S. 35, 47, 95 S.Ct. 1456, 1464, 43 L. Ed. 2d 712 (1975). Although the majority of cases in which the principle has been applied involve criminal prosecutions, the fact that, as recognized in Larkin, the rule applies to hearings before administrative agencies supports the conclusion that it is applicable to civil cases. There is no reason to conclude that our elementary notions of fairness are inapplicable to civil cases." 616 S.W.2d at 382.

Thus, from the foregoing it is abundantly clear that pursuant to Canon 3C of the Code of Judicial Conduct, a judge *must* disqualify himself in any case in which his impartiality might reasonably be questioned. The effect of this development is to substitute for the subjective standard of the earlier law an objective standard and to broaden the grounds for disqualification to include instances of situations which might lead a reasonable man to question the impartiality of the judge.

The evolution of the state law in this respect is mirrored in the amendment of 28 U.S.C. § 455 and in the cases construing the amended statute. These cases, and the express language of Canon 3C, aid in defining facts material to the determination. Appellants would submit that each of the following grounds, amply supported by evidence introduced at the hearing, mandate Judge Walker's recusal.

A. Personal Knowledge of Disputed Evidentiary Facts.

At the hearing before Judge Rolston, Appellants introduced uncontradicted testimony that one of the fundamental facts in dispute in the hearing before Judge Walker was the nature of the formation in which certain wells were

drilled and the effect of shutting in the wells on the wells themselves and the formation (Recusal S.F. 235-236). Appellants further introduced into evidence before Judge Rolston the following pronouncement of Judge Walker:

> "The Court: I'll give it to you. I wasn't being facetious when I put it like that. They say they have got a hundred fifty million, that's this bunch over here, and I made an investigation about this Austin Chalk, too, about somebody that knows about it. Said might never get them back on. They are not any good to start with. That's what this person told me.
>
> "Mr. Keahey: We may well want to put our side of that story by proof, and if so, we will ask the court for a hearing in that regard." (Recusal S.F. 246).

Canon 3C (1)(a) expressly includes as a grounds for disqualification any instance where the judge has "personal knowledge of disputed evidentiary facts concerning the proceeding." In the quoted portion from the Statement of Facts, the judge indicated unquestionably his personal knowledge of disputed evidentiary facts. For this reason alone, the Court should have recused himself from further hearings in the case.

B. Personal Bias or Prejudice.

Canon 3C further expressly holds that a court should recuse himself in instances where he "has a personal bias or prejudice concerning a party." Appellants introduced into evidence before Judge Rolston, a portion of the prior proceedings wherein Judge Walker stated "I hope that — it has come to my attention, Mr. Allums, Mr. Holloway (one of the Appellants) is making threats and this, that and the other out there about the judge and this, that and the other." (Recusal S.F. 248). By so stating, Judge Walker clearly has evidenced a bias or a prejudice, based on extra-judicial sources, against one of the parties to the suit. In *Withrow v. Larkin,* 421 U.S. 35, 47 (1975), the court held:

> "The courts have identified various circumstances which point to the conclusion that the possibility of

> actual bias of the adjudicator is too high to be constitutionally tolerable. The application of this principle is not limited to cases in which the decision maker has an 'interest' in the result. *It is applicable to cases where the judge has been the target of personal abuse or criticism from the party before him.*"

Moreover, Appellants introduced into evidence before Judge Rolston the fact that the trial court had, during the pendency of proceedings before it, invited certain of the Brownings into chambers. (Recusal S.F. 243). For this independent reason, the Court should have disqualified himself.

C. Ex Parte Communications.

In *Occidental Petroleum Corporation v. Chandler*, 303 F.2d 55 (10th Cir. 1962), the court held the district judge to be disqualified after making the following finding and conclusion:

> "The judge has conducted closed door hearings, meetings and discussions in chambers at which some but not all of the interested parties were present at the invitation of the judge that the fact of such proceedings and the matters which transpired therein should not be reported to those attorneys."

At the hearing before Judge Rolston, Appellants introduced evidence in the form of excerpts from various of the hearings before Judge Walker which disclosed numerous *ex parte* communications. For example, Appellants introduced the following interchange arising after Appellants were handed an order entered without notice and hearing. When the judge was questioned by Appellants as to the circumstances under which the order was entered, Mr. Kelsoe stated in the record that "Your Honor called Judge Gibbs and talked to him and told him about the situation and Judge Gibbs told you that he would set the order aside." When questioned as to where he derived this knowledge, Mr. Kelsoe stated: "His Honor told me that around 10:00 o'clock or 10:30 Saturday morning. To which the Court responded, "I called him Friday night . . . and told him the situation, told Kelsoe about it." (Recusal S.F. 251-252).

Appellants introduced other incidents in which Judge Walker indicated on the record the fact of *ex parte* communications (Recusal S.F. 247; 248; 250; 255). Counsel for Appellants testified without contradiction, to a consistent pattern of *ex parte* conferences (Recusal S.F. 215-216; 240). Moreover, Jack Ayres, counsel for the Brownings, necessarily admitted being privy to an *ex parte* communication between Snodgrass and Walker, stating: "That was the argument that he made. Judge Snodgrass said 'Why on earth should we have two trials?' I said he said that. This is what he and Judge Walker talked about. Why should we have two trials involving the same identical facts in separate courts? Why should we? Why should we do that? Since the evidence is going to be the same in both courts, why should I do that?" (Recusal S.F. 112). Moreover, with respect to an order jointly entered by Judge Snodgrass and Judge Walker, without notice to Appellants or an opportunity to be heard, the same counsel admitted being directed to draw the order by Walker under circumstances where opposing counsel was not present. (Recusal S.F. 320-321). Further, in testimony, counsel for the Brownings admitted the fact of conversations with the Judge wherein counsel for Appellants were not present. (Recusal S.F. 300). The consistent pattern of *ex parte* conferences between the judge and counsel for the Brownings destroyed any appearance of impartiality and thus constitutes grounds for disqualification.

D. Representation of Judge Walker.

Numerous cases construing the similar language of 28 U.S.C. § 455(a) have held that the fact of prior representation of the judge by a party's attorney might lead a reasonable person to question the impartiality of the judge. Thus, in *Smith v. Sikorsky Aircraft, et al.*, 420 F.2d 61 (C.D. Cal. 1976), the district judge held himself to be legally disqualified under the amended 28 U.S.C. § 455(a) and a virtually identical Canon 3C of the federal Judicial Code solely by virtue of the fact that the firm of attorneys representing plaintiff had associated as counsel in another case another attorney who had, 10 years earlier, represented the judge in

a personal matter before he became a judge and had also, 5 years earlier, represented the judge in his judicial capacity in a mandamus proceeding. Recusing himself, the Court stated:

> "Because of the aforesaid, the undersigned judge, although he expressly finds that he has no personal bias or prejudice concerning any party herein or any personal knowledge of disputed evidentiary facts, and does not have any other personal interest in the proceedings herein which would tend to disqualify him, nevertheless finds that his 'impartiality might reasonably be questioned . . .' "

In the instant case, counsel for the Brownings stipulated to the fact that he had represented the judge in his personal capacity (Recusal S.F. 148, 163). Moreover, Appellants introduced evidence showing that the same counsel had represented the judge in his judicial capacity on several occasions, and introduced evidence tending to show that said counsel was presently representing the judge. (Recusal S.F. 152, Exhibits Dx. 11 19), (Recusal S.F. 167). In *Potashnick v. Port City Construction Company,* 609 F.2d 1101 (5th Cir. 1980) the Court found that, when taken with the other circumstances involved, the fact that the judge was being represented, albeit only nominally, in other litigation by an attorney in the case was grounds for disqualification. In so holding the Court stated:

> "Clearly the goal of the judicial disqualification statute is to foster the appearance of impartiality."

The Court went on to note:

> "Because 28 U.S.C. § 455(a) focuses on the appearance of impartiality, as opposed to the existence in fact of any bias or prejudice, a judge faced with a potential ground for disqualification ought to consider how his participation in a given case looks to the average person on the street. Use of the word 'might' in the statute was intended to indicate that disqualification should follow

if the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality."

Appellants introduced before Judge Rolston evidence which showed not only representation of the judge by both of the counsel for the Brownings, but also by one of the counsel for the participants, by the counsel for the receiver, and by the receiver himself. (Recusal S.F. 148-163, Exhibits Dx. 14-20). Moreover, Appellants attempted to introduce evidence showing the close inter-relationship of these parties and the judge. This evidence was clearly material to the determination of whether a reasonable man might question the impartiality of the judge and was improperly excluded.

Other cases have required disqualification of the judge where one of the attorneys representing a party before the judge had represented the judge. *See, e.g., Rapp v. Van Dusen,* 350 F.2d 806 (3rd Cir. 1964), wherein the court required disqualification of the judge where one of the attorneys had represented the judge in a mandamus proceeding, i.e., in his judicial capacity; *Texaco, Inc. v. Chandler,* 354 F.2d 655 (10th Cir. 1966), wherein the Court held that where one of the attorneys in the case represented the judge in a separate damage suit, the judge was disqualified. Thus, the fact of repeated representation by opposing counsel of the judge both in his personal and judicial capacity represents an instance where the impartiality of the judge must be questioned. Accordingly, for this independent ground, Judge Walker should have recused himself and the motion for recusal should have been granted.

E. Consistent Pattern of Ex Parte Orders.

At the hearing before Judge Rolston, Appellants introduced through excerpts of the Statement of Facts from prior hearings before Judge Walker, and through testimony, the fact that the judge had entered numerous orders without according Appellants the basic rudiments of due process. (Recusal S.F. 132-145). Appellants further testified that cer-

tain of these orders issued immediately after ex parte conferences (Recusal S.F. 140), and counsel for plaintiffs admitted at least one instance in which an order entered without notice or hearing arose directly from an ex parte communication between said counsel and the judge. (Recusal S.F. 250). Appellants submit that a consistent pattern of ex parte orders demonstrate, conclusively, an instance where the impartiality of the judge might reasonably be questioned.

Appellants submit that each of the foregoing matters calls into question the impartiality of Judge Walker, and thus, under applicable law constitutes an independent ground for disqualification. Moreover, the cumulative effect of the foregoing can leave no question as to whether or not a reasonable man might question the impartiality of the judge. Accordingly, the overruling of the motion constitutes a clear abuse of discretion. This Court, on this independent basis, should reverse and remand the case with directions that the trial court enter an order granting Appellant's Motion to Recuse.

* * *

APPENDIX 4

NO. 82-5742-I

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
162ND JUDICIAL DISTRICT

FAIRWAY LAND COMPANY, et al.,

vs.

HUMBLE EXPLORATION COMPANY, et al.,

vs.

JANE H. BROWNING, et al.

MOTION TO RECUSE

COME NOW Humble Exploration Company, Inc., Pat S. Holloway, Hollway Exploration Corporation and Sterling Pipeline Company, (hereinafter "Movants") and move this Court to recuse himself, or, alternatively, in the event that this Court declines to do so, that he make proper and immediate request under TEX.REV.CIV.STAT.ANN. Art. 200a and Rule 18a of the Texas Rules of Civil Procedure of the presiding judge of the first administrative judicial district that the presiding judge hear, or assign another judge of the administrative district to hear this motion, and in support thereof would show the court as follows:

I.

Movants would show this Court that they presently have on file herein Pleas of Privilege and Pleas in Abatement wherein they assert that this Court has no jurisdiction to proceed in either the action brought by Fairway Land Company, *et al.* or the cause of action attempted to be brought herein by the Browning Interests. With respect to the latter action, this Court has previously overruled Movants' Pleas in Abatement and has set the matter for trial on July 6, 1982. This Court has yet to set for trial before a jury

Movants' Plea of Privilege. Without in any way waiving their claim that this Court has no jurisdiction to proceed, Movants request that this Court recuse himself in both matters.

II.

Under the Constitution and laws of the State of Texas and of the United States, Movants have the right to have their case heard and adjudicated before a judge who is fair and impartial and who conducts his proceedings in accordance with the various canons of the Code of Judicial Conduct. Under Canon 3c of the Code this Court should disqualify himself in situations where his impartiality may reasonably be questioned. Canon 3c provides in relevant part as follows:

> "(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including, but not limited to, instances where:
>
> (a) He has a personal bias or prejudice concerning a party, . . .
>
> (c) Or any other interests that could be substantially affected by the outcome of this proceeding."

III.

Movants would show this Court that the impartiality of this judge might reasonably be questioned, or that the judge may appear to be less than impartial for the following reasons:

(a) Movants believe that this Court has either initiated or considered numerous ex parte communications with counsel for the Brownings and/or Fairway Land Company, *et al.* concerning the proceedings pending before him;

(b) Movants believe and assert that this Court has failed to accord them their full rights to be heard according to law and has entered numerous orders without notice and without a hearing, all of which have been against, and in severe derogation of the rights of Movants;

(c) Movants believe that this Court has in the past been represented by counsel for Fairway Land Company, *et al.* and by counsel for the Brownings and that this Court is being presently represented by counsel for the Brownings, who are in fact, parties in interest in this action. By virtue of present representation, this Court has need to consult with such counsel and has ongoing relations with these parties which may be affected by this Court's rulings in this court;

(d) Movants assert that this Court, in ruling on the Brownings' petition for declaratory relief, over Movants' demand for a jury trial, has summarily denied Movants their fundamental rights to a jury.

(e) This Court has indicated in remarks from the Bench that it has received ex parte communications and that it has accepted as true, or assumes to be true, many of the disputed fact issues in this case.

(f) Movants believe that this Court has made public statements concerning the merits of this case, which evidence prejudgment of facts in dispute.

For the foregoing reasons, Movants assert that the impartiality of this court may reasonably be questioned, and urge that in order to avoid the appearance of impropriety this Court should recuse himself in favor of a Court to be assigned by the presiding judge.

IV.

Movants would show that under Art. 200a and Rule 18, if this Court declines to recuse himself he shall forward to the presiding judge of the administrative judicial district an order of referral, this motion and any pleadings in response thereto and request that the presiding judge hear or assign this motion for hearing upon notice to all parties herein. Movants would further show this Court that this Court should make no further orders and take no further action in this case pending the hearing and disposition of this motion.

WHEREFORE, PREMISES CONSIDERED, Movants pray that upon hearing of this motion, this Court recuse himself, or, in the event that this Court declines to do so, that he make proper request under Rule 18a and Art. 200a and that pending the determination of this motion, he take no further action in this cause.

Respectfully submitted,

/s/ JAMES H. KEAHEY

James H. Keahey
Bar No. 11138000
414 Brady Lane
Austin, Texas 78746
(512) 327-0941

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Motion to Recuse was hand delivered to all counsel of record on this 25th day of June, 1982.

/s/ JAMES H. KEAHEY

VERIFICATION

The STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared James H. Keahey, who, being by me first duly sworn, did on his oath depose and say Attorney for Movants in the above styled proceedings, and that as such he is authorized to make this affidavit and that he has read the foregoing Motion To Recuse and that the facts stated therein and the allegations therein made are true and correct.

/s/ JAMES H. KEAHEY

SUBSCRIBED AND SWORN TO before me this the 24th day of June, 1982.

/s/ PAT MCKEOWN
Notary Public in and for
Dallas, Dallas County, Texas

My Commission expires:
April 7, 1984

APPENDIX 5

NO. 82-5742-I

IN THE DISTRICT COURT
DALLAS COUNTY, TEXAS
162ND JUDICIAL DISTRICT

FAIRWAY LAND COMPANY, et al.,

vs.

HUMBLE EXPLORATION COMPANY, INC., et al.,

vs.

JANE H. BROWNING, et al.

SUPPLEMENTAL MOTION TO RECUSE

TO THE HONORABLE MORRIS M. ROLSTON:

COME NOW Humble Exploration Company, Inc., Pat S. Holloway, Holloway Exploration Corporation and Sterling Pipeline Company (hereinafter "Movants") and having previously filed herein their Motion to Recuse, which motion has been set for hearing, file this their Supplemental Motion to Recuse, and would show this Court additional grounds for granting the relief requested in the Motion to Recuse, as set forth following:

I.

In addition to those reasons set forth in paragraph III of the Motion to Recuse, Movants would show this court that the impartiality of the Honorable Dee Brown Walker might reasonably be questioned, or that he may appear to be less than impartial for the following reasons:

(a) Movants believe and assert that this court has acted in such a manner as could reasonably be believed to evidence a bias in favor of both the Plaintiffs and the Browning Interests, and counsel for such parties, and a bias against Movants and their counsel;

(b) Movants believe that this court, in entering various orders without notice and proper hearing and in setting other hearings on an unreasonably accelerated basis, has denied Movants due process under the state and federal constitution.

WHEREFORE, PREMISES CONSIDERED, Movants pray that the relief requested in their Motion to Recuse be in all things granted.

Respectfully submitted,

/s/ JAMES H. KEAHEY
James H. Keahey
Bar No. 11138000
414 Brady Lane
Austin, Texas 78746
(512) 327-0941

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Supplemental Motion to Recuse was hand delivered to all counsel of record on this 1st day of July, 1982.

/s/ JAMES H. KEAHEY
James H. Keahey

VERIFICATION

The STATE OF TEXAS }
COUNTY OF DALLAS }

BEFORE ME, the undersigned authority, on this day personally appeared James H. Keahey, who, being by me first duly sworn, did on his oath depose and say that he is the Attorney for Movants in the above-styled proceedings, and that as such he is authorized to make this affidavit and that he has read the foregoing Supplemental Motion To Recuse and that the facts stated therein and the allegations therein made are true and correct.

/s/ JAMES H. KEAHEY
James H. Keahey

SUBSCRIBED AND SWORN TO BEFORE ME this the 30th day of June, 1982.

/s/ KAY HANKS
Notary Public in and for
the State of Texas

My Commission Expires:
1-25-86

KAY HANKS
Printed Name of Notary